DOCKET

No. 08-10495 *** CAPITAL CASE ***
Title: Joseph E. Corcoran, Petitioner
v.
Mark Levenhagen, Superintendent, Indiana State Prison
Docketed: May 20, 2009
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (07-2093, 07-2182)
Decision Date: December 31, 2008
Rehearing Denied: February 24, 2009

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~
May 18 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 19, 2009)
Jun 17 2009	Order extending time to file response to petition to and including July 20, 2009.
Jul 20 2009	Brief of respondent Mark Levenhagen, Superintendent, Indiana State Prison in opposition filed.
Jul 30 2009	DISTRIBUTED for Conference of September 29, 2009.
Aug 3 2009	Reply of petitioner Joseph E. Corcoran filed. (Distributed)
Oct 5 2009	DISTRIBUTED for Conference of October 9, 2009.
Oct 13 2009	DISTRIBUTED for Conference of October 19, 2009.
Oct 20 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)

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PETITION FOR WRIT OF CERTIORARI

08-6495

No. 08-_____

In The Supreme Court Of The United States

JOSEPH EDWARD CORCORAN,

Petitioner,

v.

MARK A. LEVENHAGEN, Warden,

Respondent.

SUPREME COURT, U.S.
FILED
MAY 18 2009
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

Petitioner's undisputed mental illness, paranoid schizophrenia, provides a compelling context in which to consider his request.

1. Can A Mentally Ill Defendant Be Penalized With A Heightened Sentence, Death, In Violation Of *United States v. Jackson*, 390 U.S. 570 (1968), For Asserting His Right To Have His Guilt Determined By A Jury?

2. Whether A State Court's Competency Determination Constitutes An "Unreasonable Determination Of The Facts" And Is Rebutted Under The Clear And Convincing Standard Under *Wiggins v. Smith*, 539 U.S. 510 (2003) And *Miller-El v. Dretke*, 535 U.S. 231 (2005), In That The Unchallenged And Unanimous Expert Opinions Are That The Paranoid Schizophrenic Petitioner Is Incompetent And Is Making An Irrational Decision Based On The Desire To End The Anguish Caused By A Non-Existent Sleep And Speech Disorder, And To End The Torture Administered By Corrections Officers Via An Ultrasound Machine?

3. Is A Habeas Petitioner Entitled To Merits Review Of His Federal Constitutional Claims When There Has Not Been A Procedural Default And The Federal Constitutional Claims Were Properly Presented In The Habeas Petition?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A Procedural History 3

B. Summary of Relevant Facts 5

1. Facts Related to Penalizing Invocation of Right to Jury 5

2 Facts Related to Mental Illness 6

REASONS FOR GRANTING THE WRIT 12

I. Petitioner Raises An Important Constitutional Question Premised Upon *United States v. Jackson*, 390 U.S. 570, 582 (1968) And The Doctrine Of Unconstitutional Conditions. And The Seventh Circuit's Ruling Represents A Dramatic Departure From This Court's Precedent And Conflicts With This Court's Decision In *Jackson* 12

II The Seventh Circuit's Majority Opinion Represents A Dramatic Departure From This Court's Precedent And Conflicts With This Court's Decision In *Wiggins* and *Miller-El* 18

IV. This Court Should Remand this Matter Back to the District Court or the Court of Appeals And Require the Consideration of Federal Constitutional Claims Which Are colorable and not procedurally defaulted 23

CONCLUSION 25

CERTIFICATE OF SERVICE 26

APPENDIX

TABLE OF AUTHORITIES

Cases

Bell v Cone, 2009 U.S. LEXIS 3298 (2009) 24, 25

Ben-Yisrayl v Buss, 540 F.3d 542 (7th Cir. 2008) 23

Borderkarcher v Hayes, 434 U.S 357 (1978) 13, 15

Boykin v Alabama, 395 U.S. 238 (1969) 15

Brady v. Unites States, 397 U.S. 742 (1970) 13, 14, 15

Chaffin v Stynchcombe, 412 U.S. 17 (1973) 14, 15

Corbut v New Jersey, 439 U.S. 212 (1978) 15

Corcoran v. Buss, 551 F.3d 703 (7th Cir. 2008) ..... passim

Corcoran v Buss, 483 F.Supp.2d 709 (S.D. Ind. 2007) ..... passim

Corcoran v. State, 739 N.E.2d 649 (Ind. 2000) 2, 3, 6,

Corcoran v State, 820 N.E.2d 655 (Ind. 2005) 2, 11, 19, 20

Corcoran v. State, 774 N.E.2d 495 (Ind. 2002) 3, 6

Corcoran v. State, 845 N.E.2d 1019 (Ind. 2006) 4

Faretta v California, 422 U.S. 806 (1975) 15

Godinez v Moran, 509 U.S. 389 (1993) 15

Hynes v Tomei, 706 N.E.2d 1201 (N.Y. 1998) 12

Mendiola v. Schomig, 224 F.3d 589 (7th Cir. 2000) 5, 19, 23

Miller-El v Dretke, 535 U.S. 231 (2005) 18, 23

New York v Hill, 528 U.S. 110 (2000) 15

North Carolina v. Alford, 400 U.S. 25 (1970) 14

Rees v Peyton, 384 U.S. 312 (1966) 18

Ricketts v. Adamson, 483 U.S. 1 (1987) 15

Ruiz v. United States, 536 U.S. 622 (2002) 15

Simmons v. United States, 390 U.S. 377 (1968) 12

Stewart v. Peters, 1992 U.S. APP. LEXIS 6330 (7th Cir. 1992) 23, 24

United States v. Broce, 488 U.S. 563 (1989) 15

United States v. Hare, 269 F.3d 859 (7th Cir. 2001) 15

United States v. Jackson, 390 U.S. 570 (1968) ..... passim

United States v. Mezzanatto, 513 U.S. 196 (1995) 15

United States v. Warda, 285 F.3d 573 (7th Cir. 2002) 15

Wiggins v. Smith, 539 U.S. 510 (2003) 18, 23

Williams v. Bartow, 481 F.3d 492 (7th Cir. 2007) 15

Wright v. Walls, 288 F.3d 937 (7th Cir. 2002) 24

Statutes and Rules

28 U.S.C. § 2254(d)(1) 5

28 U.S.C. § 2254(d)(2) 2, 18

28 U.S.C. § 2254(e)(1) 2-3

28 U.S.C. § 1254(1) 2

U.S. Const. Art. I, § 9, clause 2 3

Sixth Amendment 2, 12

Fourteenth Amendment, § 1 2

Sup. Ct. R. 10(a) 17

Sup. Ct. R. 10 (c) 17, 23

Other Authority

RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 219, (7th ed. 2007) 16

Andrew Liepold, *Why are Federal Judges so Acquittal Prone?*, 83 WASH U L Q 151, (2005) .. 17

No. 08-_____

In The Supreme Court Of The United States

JOSEPH EDWARD CORCORAN,

Petitioner,

v.

MARK A. LEVENHAGEN, Warden,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Edward Corcoran respectfully prays that a Writ of Certiorari issue to review the judgment entry of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the district court granting in part and denying in part Petitioner's habeas petition is reported at *Corcoran v. Buss*, 483 F.Supp.2d 709 (S.D. Ind. 2007). Apx. 1-19. The opinion of the Seventh Circuit Court of Appeals reversing the grant of habeas relief, and otherwise affirming the district court is reported at *Corcoran v. Buss*, 551 F.3d 703 (7th Cir. 2008). Apx. 20-29. On February 24, 2009, the Seventh Circuit Court of Appeals denied Petitioner's request for rehearing and rehearing en banc. Apx. 30

The Indiana Supreme Court's decision denying Petitioner's *United States v Jackson*, 390 U.S. 570 (1968) claim is *Corcoran v State*, 739 N.E.2d 649 (Ind. 2000). Apx. 31-36 The Indiana Supreme Court's decision denying Petitioner's competency challenge is *Corcoran v State*, 820 N.E.2d 655 (Ind. 2005). Apx. 37-47.

JURISDICTIONAL STATEMENT

The decision of the court of appeals became final on February 24, 2009 This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves interpretation of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, Section 1, which provide:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves interpretation of 28 U.S.C. 2254(d)(2) and (e)(1), which provide

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim...(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The case also implicates the Suspension of Writ Clause, U.S. Const. Art. I, § 9, clause 2, which provides "The Privilege of the Writ of Habeas Corpus shall not be suspended."

STATEMENT OF THE CASE

A. Procedural History

The State of Indiana charged Petitioner with four counts of murder on July 31, 1997. On May 11, 1998, the state withdrew from negotiations with Petitioner. The nature of the negotiations was two fold – one involved a straight guilty plea, while the second involved the waiver of a jury trial for taking death off the table.

On May 13, 1998, the state filed four applications for the death penalty. Jury selection began on May 17, 1999. On May 20, 1999 the trial began. On May 22, 1999, Petitioner was found guilty of four counts of murder. On August 26, 1999, the trial court sentenced Petitioner to death.

On direct appeal, Petitioner challenged only his sentence.[1] The Indiana Supreme Court then remanded his case to the trial court for re-sentencing because the trial court considered non-statutory aggravators in choosing the death penalty. *Corcoran v. State*, 739 N.E.2d 649, 657 (Ind. 2000). On September 30, 2001, the trial court reinstated Petitioner's death sentence. After a remand, the Indiana Supreme Court affirmed Petitioner's death sentence. *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002) (Rucker, J., dissenting as to sentence based upon Petitioner's mental

[1] This demonstrates Petitioner's irrational decision making process given that he insisted upon pursuing a jury trial, and then waived issues related to what he insisted upon receiving. Indeed, Dr. Coons concluded that Petitioner's "ultimate refusal to accept either a plea bargain or a bench trial without the death penalty was a product of his mental illness." Def.'s Pre-Sent. Memo. at 24.

illness).

On April 2, 2003, a Notice of Intent to File Post-Conviction Relief verified by Petitioner was filed in the trial court. On September 9, 2003, Petitioner filed an unverified Petition for Post-Conviction Relief and a request to determine competency.

In 2003, at Petitioner's post-conviction competency hearing, all three mental health experts testified that Petitioner was not competent to waive his appeals. PC Comp. TR. 13, 55, 59, 66. All concluded Petitioner suffers from paranoid schizophrenia. *Id.* at 11, 48, 66. All three testified that Petitioner's decision-making on this issue was not rational but, instead, based on a delusion that the Department of Correction ("DOC") was torturing him with an ultrasound machine. *Id* at 14, 53, 67. In spite of this evidence, on December 19, 2003, the trial court concluded Petitioner was competent to waive post-conviction proceedings (PC R. 247-249), which the Indiana Supreme Court affirmed *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005) (Rucker, J., dissenting as to competence to waive based upon Petitioner's mental illness).

Petitioner later changed his mind and attempted to file a verified state post-conviction petition, which the trial court denied On April 26, 2006, the Indiana Supreme Court affirmed this denial. *Corcoran v State*, 845 N.E 2d 1019 (Ind. 2006) (Rucker, J., dissenting).

Thereafter, Petitioner filed a Petition for a Writ of Habeas Corpus with the United States District Court for the Northern District of Indiana. Petitioner alleged eight grounds for relief The District Court issued a conditional writ of habeas corpus based on the first ground, the prosecution's illegal offer to take the death penalty off the table if Petitioner agreed to waive his constitutional right to be tried by a jury. The District Court concluded that the Indiana Supreme Court's decision in *Corcoran*, 774 N.E.2d 495, was contrary to or unreasonable pursuant to

2254(d)(1) and that Petitioner's rights were violated pursuant to *United States v. Jackson*. The district court ordered the State to re-sentence Petitioner to a sentence other than death within 120 days. *Corcoran v Buss*, 483 F.Supp.2d 709, 726 (N.D. Ind. 2007) The District Court further held that despite Petitioner's long history of mental illness and unstable behavior that it was not unreasonable for the Indiana Supreme Court to rule that his waiver of post-conviction claims for relief was made knowingly, intelligently and voluntarily. *Id.* at 733-34

The Seventh Circuit reversed the district court's grant of relief. *Corcoran*, 551 F.3d at 709-712, comparing Petitioner's circumstance to the *Alford* plea situation. A divided Seventh Circuit denied Petitioner's cross-appeal related to Petitioner's competence. *Id.* at 713-714. Judge Williams dissented because the state court competency finding ignored the actual record evidence:

> The problem with the conclusion that Corcoran had the capacity to make a rational choice is that two of the court's three reasons are directly contradicted by the evidence presented. *See Mendiola v. Schomig*, 224 F.3d 589, 592 (7th Cir. 2000) ("If a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254."). First, the court reasoned Corcoran never told any of the experts that he wanted to die to escape his delusions. That is not true. Second, the court stated that each expert indicated Corcoran's medication controlled his psychotic symptoms. That also is not true.

Corcoran, at 716 (Williams, J., dissent).

B. Summary of Facts –

1. Facts Related to Penalizing Invocation of Right to Jury

The State did not pursue the death penalty until after Petitioner refused to waive his right to a jury and plead guilty. The District Court recognized that the state's proposal was comprised of *two* separate deals:

> It is of critical importance to note that the Supreme Court of Indiana

> recognized that the petitioner faced two distinct offers from the prosecution prior to trial. First, he was offered the opportunity to plead guilty. In exchange the prosecutor would not seek the death penalty. Second, he was offered to waive his right to a jury trial and proceed with a bench trial. In exchange the prosecutor would not seek the death penalty.

Corcoran, 483 F. Supp. 2d 709, 720-21. The District Court noted the Indiana Supreme Court similarly found that two deals were offered:

> The defendant asserts that in his case he declined the State's offer to accept a guilty plea or try his case to the bench and thereby avoid the death penalty. . . . In the context of plea bargaining, we do not see a material distinction in the discretionary powers of the prosecutor in offering to agree to a lesser sentence for a guilty plea or for a bench trial.

Id. at 720 (quoting *Corcoran v. State*, 739 N.E.2d 649, 654 (Ind. 2000)).

2. *Facts Related to Mental Illness*

The Indiana Supreme Court made the following factual findings when detailing the reasons for Petitioner's crimes:

> Joseph E. Corcoran was under stress because his sister's upcoming marriage would necessitate his moving out of her house. And his brother said Corcoran could not move in with him.
>
> He awoke one afternoon to hear his brother and others downstairs talking about him. Irritated, he loaded his rifle and went downstairs to intimidate them, but as Corcoran said later, "It just didn't happen that way." (R. at 1988.) Corcoran killed his brother, his sister's fiance, and two other men in the ensuing incident.

Corcoran v. State, 774 N.E.2d at 495, 497 (Ind. 2002). Petitioner acted out of stress, magnified by his mental illness, and did not intend the tragic results of his actions.

Substantial evidence was presented at trial and in post-conviction that Petitioner was suffering from delusions and hallucinations at the time of his trial and prior to the offenses. First, Larry Davis, M.D., in March of 1999, consulted with the defense about the merits of a plea

agreement. Dr. Davis relied on recent jail medical records as strong evidence of Petitioner's psychosis. The records confirmed his earlier belief of a psychotic disturbance. Dr. Davis diagnosed Petitioner with schizophrenia, and concluded Petitioner was unable to competently assist his attorneys in his defense. Dr. Davis' report states:

> Most examiners concluded that he was competent to stand trial. He clearly understood the nature of the court process he was facing, and in a strict sense probably had the capacity to work cooperatively with his defense counsel. Unfortunately, in reality, *I believe his underlying psychosis and associated illogic rendered him incompetent, specifically to work effectively with his own defense attorneys in his defense. Because he was not grossly psychotic his lack of rational thinking and working with his attorney was not clear to the courts.*

Def.'s Pre-Sent. Memo. at 23 (emphasis added).

Next, Dr. Philip Coons, M.D., professor of psychiatry at Indiana University School of Medicine, was brought in to assess whether Petitioner was and had been able to assist counsel. Dr. Coons found that Petitioner was suffering from paranoid schizophrenia. Indeed, Dr. Coons testified that at the time of the murders Petitioner was suffering from paranoid schizophrenia and from schizotypal personality disorder. TR 2729. Dr. Coons concluded that Petitioner's paranoid schizophrenia "*affected his ability to assist his attorney in his defense. His ultimate refusal to accept either a plea bargain or a bench trial without the death penalty was a product of his mental illness.*" Def.'s Pre-Sent. Memo. at 24 (emphasis added). Dr. Coons noted that Petitioner was concealing his grossly psychotic delusions and hallucinations. "[T]he person with paranoid schizophrenia generally minimizes their symptoms and doesn't bring attention to them...unless you know what door to open, what question to ask, you may well miss it because they keep it to

themselves. And that was true of Mr. Corcoran. Had I not known about some kind of sleep problem, I don't think I would have uncovered this delusional system." TR at 2706.[2]

At Petitioner's competency hearing, all three mental health experts testified that Petitioner was not competent to waive his appeals. PC Comp. TR. 13, 55, 59, 66. Dr. George Parker, a board certified forensic psychiatrist, diagnosed Petitioner with paranoid schizophrenia based on his delusions, auditory hallucinations, and negative symptoms, such as lack of emotion. *Id.* at 47, 48. Petitioner believes that the DOC has an ultrasound machine that it uses to torture him with sounds and a number of physical symptoms. *Id.* at 50. Petitioner hears sounds that he believes are being projected from this ultrasound machine, which he also thinks can broadcast his thoughts throughout the prison. *Id.* at 51. He believes that he can hear people talking about him through the walls of his cell. *Id.* Additionally, Petitioner holds a delusional belief that he "speaks in his sleep and says embarrassing or provocative things that make people act in strange ways or perhaps hostile ways towards him. When that delusion is more intensive, he begins to believe that he . . . while awake . . is essentially asleep and speaking involuntarily." *Id.* at 49.

These delusions and hallucinations prevent Petitioner from making a rational decision about whether to end his appeals. *Id.* at 53. Dr. Parker also noted the stigma and Petitioner's overwhelming desire to down play his mental illness, noting "It speaks to how powerful the stigma is against serious mental illness, that he would rather be executed than admit that schizophrenia might be contributing to his desire to die." *Id.* at 56-57. Dr. Parker noted that Petitioner attributes his difficulties "to some physical disorder" and that "he truly believes" there

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[2] Dr. Engum agreed that Petitioner is "trying to mask it. He's trying to hide it. He's very secretive, again consistent with paranoia and suspiciousness." TR 2318.

is an ultrasound machine, and that "[y]ou don't break through that illogic. That is the nature of the delusion. You can't convince the person otherwise." *Id.* at 58.

Dr. Kaplan, a clinical psychologist, reviewed extensive records regarding Petitioner and conducted a clinical interview and psychological testing. *Id.* at 9, 11. Dr. Kaplan also diagnosed Petitioner with paranoid schizophrenia. *Id.* at 11. Dr. Kaplan also reported delusions that he suffers from a speech disorder and is being tortured by an ultrasound machine. *Id.* at 12-13, 14. Dr. Kaplan indicated Petitioner did not have the capacity to make a rational choice because:

> [H]e has, -- he has a psychosis which is paranoid schizophrenia that is leading him to believe that, you know, one of the reasons that he wants to die is because he doesn't want to continue to suffer with this speech disorder that he really doesn't have. And another reason he wants to die is because he doesn't want to continue to be a victim of the guards' ultrasound machine. And that is a highly bizarre belief that it is not likely to be in existence either.

Id. at 14. Dr. Kaplan affirmed that Petitioner's "paranoid schizophrenia is creating a reality in his mind that doesn't exist, and on the basis of the reality that doesn't exist, he is making decisions about whether he wishes to proceed with his defense against the death penalty or not." *Id.* at 17. On cross, Dr. Kaplan reiterated that "for a psychotic reason he told me he didn't want to go with these proceedings . . ." *Id.* at 31. Indeed, Petitioner "can't even conceive of reality as a normal person would" (*id.* at 32), and "can't think straight [and] can't reason logically." *Id.*

Dr. Kaplan further noted that while medications may help Petitioner, they have a "variable effect" and he is still paranoid and delusional while taking them. *Id.* at 34. The medications do not control Petitioner's symptoms of paranoid schizophrenia.

Dr. Edmund Haskins, a neuropsychologist, also diagnosed Petitioner as a paranoid schizophrenic with delusions. *Id.* at 66. Dr. Haskins found Petitioner suffers from two delusions: "one, involving the notion that he has, um, involuntary speech, and the other one

involving the notion that the guards in the prison have an ultrasound machine that they are using to torment him. On both counts, I believe that this indicates paranoid schizophrenia." *Id.*

Dr. Haskins testified that Petitioner's "psychoses do not permit him to reason and make a reasoned decision." *Id.* at 67. Dr. Haskins affirmed that Petitioner needed to escape the pain of the delusions. *Id.* at 68 ("... he wants to escape in whatever way he can. And the only way open to him, is to bring about his own death."), *Id.* at 69 ("wanting to choose the only option that is going to bring him what he perceives, as being relief, which is his own death."). Additionally, Dr. Haskins had "the very strong feeling [Petitioner] was attempting to minimize the severity of his underlying psychosis." *Id.* at 71.

According to the experts, Petitioner's mental illness prevents him from making a rational choice. Dr. Kaplan testified that Petitioner's decision was not rational because it was made on "the basis of a reality that doesn't exist." *Id.* at 17. Dr. Parker testified that Petitioner is unable to make a rational decision because his schizophrenia has "a direct bearing on his thought process" and why he wants to be executed. *Id.* at 55. Dr. Haskins compared rational decision making with Petitioner's decision making.

> [I]n order to make a rational decision, one has to adequately hold in mind the available options that one is considering. You have to consider the options. You have to make reasoned judgments, weighing pros and cons of both options or whatever the options happen to be. In Mr. Corcoran's case, in the context of this particular decision about waiving his right to post-conviction review, I believe his psychoses do not permit him to reason and make a reasoned decision in that way.

Id. at 66-67.

Each expert also testified that Petitioner was not able to rationally consult with counsel. Dr. Parker testified that because of the way Petitioner experiences life, "with its delusions and hallucinations and negative symptoms of schizophrenia, he is unable to process what, for most

people would be reasonable advice regarding his legal proceedings." *Id.* at 59. This uncooperativeness is not a choice, but a result of his mental illness and "the psychotic perception that he is being tormented and has this illness." *Id.* at 70.

Drs. Parker, Kaplan and Haskins all testified that Petitioner's decision to waive his appeals was based, not on logical reasoning, but on his overwhelming desire to escape his psychiatric symptoms. Dr. Parker noted in Petitioner's view his execution would be "a blessed relief [from] the daily torment of his symptoms of psychosis. . ." *Id.* at 55-56. Petitioner told Dr. Kaplan that "he wanted to die was because he wanted to be released from the quote, unquote, pain and suffering of his involuntary speech disorder which really doesn't exist." *Id.* at 19. Dr. Haskins agreed that "he wants to escape [from his discomfort] in whatever way he can. And the only way open to him, is to bring about his own death." *Id.* at 68.

The State conceded that Petitioner is mentally ill (PC R. 242), and the Indiana Supreme Court recognized that it was undisputed that Petitioner was mentally ill and suffered from paranoid schizophrenia. *Corcoran*, 820 N.E.2d at 660. The court concluded, however, that Petitioner was competent to waive post-conviction review because: 1) Petitioner made no statement to any evaluating expert that he wanted to waive in order to escape the delusions (*id.* at 660); 2) prison treatment records demonstrate that medication was controlling his psychotic symptoms (*id.*); and 3) Petitioner was aware of his legal position and the consequences of a waiver. *Id.* at 660-662. As pointed out by the Seventh Circuit Dissent, the record does not support these bases.

REASONS FOR GRANTING THE WRIT

I. Petitioner Raises An Important Constitutional Question Premised Upon *United States v. Jackson*, 390 U.S. 570, 582 (1968) And The Doctrine Of Unconstitutional Conditions, And The Seventh Circuit's Ruling Represents

A Dramatic Departure From This Court's Precedent And Conflicts With This Court's Decision In *Jackson*.

Petitioner raises a rare but important circumstance where the long-standing principles of *United States v. Jackson*, 390 U.S. 570 (1968), have been violated by the State of Indiana. A prosecutor cannot chill the exercise of a defendant's right to a jury trial with the threat of the death penalty. Undersigned Counsel candidly admit that this unique issue has arisen due to Petitioner's severe mental illness. *See* Second Question Presented.

The well-established doctrine of unconstitutional conditions states that a criminal defendant cannot be needlessly penalized for exercising a constitutional right. *See Simmons v. United States*, 390 U.S. 377 (1968); *Jackson*, 390 U.S. at 582 (1968).[3] The district court correctly held that the trial prosecutor's offer violated the doctrine of unconstitutional conditions. *Corcoran*, 483 F.Supp 2d at 720-726. The prosecutor violated clearly established law when he urged Petitioner to waive his right to a jury in exchange for the prosecutor's promise to not pursue the death penalty. *Id.* at 722 ("It is beyond doubt that prosecutors can negotiate for guilty pleas. What they cannot do is strike a deal whose object is nothing more than a punishment for the exercise of a constitutional right."). The prosecutor's illegal behavior continued with his insistence on the death penalty once Petitioner refused to waive his constitutional rights. Petitioner was sentenced to death because he refused to waive his Sixth Amendment right to a jury trial. Thus, Indiana unconstitutionally sought to chill or squelch the assertion of his constitutional right to a jury trial by penalizing Petitioner with a death sentence for exercising that right. *Id.* at 722.

This Court, in *Jackson*, emphasized that: "The question is not whether the chilling effect

[3] In *Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y. 1998), the New York Supreme Court invalidated New York's death penalty statute on the basis of *Jackson*.

is 'incidental' rather than intentional; the question is whether that effect is *unnecessary* and therefore *excessive*." 390 U.S. at 582 (emphasis added) In accordance with this court's *Jackson* sentiments, the District Court correctly stated: "the petitioner was punished when he refused to waive his right to a jury trial and agree to allow a judge to determine his guilt. The time sequence of such an offer and the filing of death penalty charges is not relevant. That is to say, it does not matter whether the offer is to dismiss previously filed charges or to refrain from filing in the future. The constitutional taint is the same." *Corcoran*, 483 F Supp.2d at 725. The constitutional error is the attempt to chill his assertion of his right to a jury – and instead have his guilt and sentence determined by a court. *See e.g. id.* at 725 (noting the difference between "pleading guilty or going to trial, [and] whether to be tried by a judge or a jury.")

"Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Brady v. Untes States*, 397 U.S. 742, 748 (1970). As noted by the District Court, in Petitioner's case "neither can such an offer be considered a plea bargain since no plea is involved. It was not a confession that was asked of the defendant, but rather only a waiver of his right to a trial by jury." *Id.* at 721 So long as innocence is contested, constitutional rights cannot be subject to compromise via the threat of the death penalty. *See Jackson*; *Borderkircher v. Hayes*, 434 U.S. 357, 363 (1978)("for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'")

When a defendant pleads guilty or does not contest guilt there is an added safeguard that the judge must believe that he is actually guilty. This Court in *Brady* was quite confident that false guilty pleas are rare.

[O]ur view . . . is based on our expectations that courts will satisfy themselves that

> pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.

Id. at 758. It is for this reason that plea bargaining is mutually advantageous to prosecutors and guilty defendants. And it is the mutually advantageous nature of plea bargaining that has saved it from violating the doctrine of unconstitutional conditions. "[G]uilty pleas are not constitutionally forbidden . . . because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. *Id.* at 751-52. The offer in Petitioner's circumstance was not a plea bargain, so *Bordenkircher* is easily distinguished. *See Corcoran*, 483 F.Supp.2d at 721 ("That offer did not ask nor require [Petitioner] to plead to anything, it only asked him to waive his right to a jury trial and proceed with the judge as the factfinder. Such an offer is not common.")

The mutuality of advantage that justifies the encouragement of plea bargains is absent with respect to jury waivers. A person will not plead guilty if he does not believe that he will in fact be found guilty and he cannot plead guilty unless the judge believes that he is guilty. Neither of these circumstances is necessary for a jury waiver.

The same policies stand in the circumstances of an "*Alford* plea." In *North Carolina v Alford*, 400 U.S. 25 (1970), this Court countenanced a defendant entering a *nolo contendere* plea in exchange for a sentence less than death. While obviously not a straight plea situation, the key similarity between an *Alford* scenario and a straight plea is that there is no contest of guilt, i.e. guilt is no longer in play in either scenario (*see Chaffin v Stynchcombe*, 412 U.S. 17, 30 (1973) (where this Court grouped *Alford* with straight plea cases)), unlike Petitioner's and *Jackson's* circumstances where guilt is contested and in play.

Every case cited by the Seventh Circuit involved a circumstance where guilt was not in play or involved a knowing, intelligent and voluntary waiver where the quality of the judicial process was not compromised. *See Corcoran*, 551 F.3d at 709-712. Specifically, the cases cited by the Seventh Circuit involved:

- Guilty pleas or the rights that may be waived via a guilty plea and its process; *Brady v United States*, 397 U.S. 742 (1970), *Corbitt v New Jersey*, 439 U.S. 212 (1978), *Bordenkircher v Hayes*, 434 U.S. 357 (1978), *Boykin v. Alabama*, 395 U.S. 238 (1969), *Godinez v. Moran*, 509 U.S. 389 (1993), *Ruiz v. United States*, 536 U.S. 622 (2002), *United States v. Mezzanatto*, 513 U.S. 196 (1995), *United States v Broce*, 488 U.S. 563 (1989), *Ricketts v Adamson*, 483 U.S. 1 (1987), and *United States v Hare*, 269 F.3d 859 (7th Cir. 2001),

- Re-Sentence after habeas grant; *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973),

- Vindictiveness claims; *Williams v Bartow*, 481 F.3d 492 (7th Cir. 2007), *United States v. Warda*, 285 F.3d 573 (7th Cir. 2002);

- Waiver of time limits, *New York v. Hill*, 528 U.S. 110 (2000); and,

- Waiver of right to counsel at trial, *Faretta v. California*, 422 U.S. 806 (1975).

Again, the Seventh Circuit only cited authority which involved cases where guilt was not contested/was not in play or the defendant's waiver did not involve relinquishing any plenary trial rights concerning his guilt or innocence. Inversely, the Seventh Circuit could not cite any authority that allowed the penalizing of a constitutional right when guilt was contested/ in play.

This Court in *Jackson* noted that it is "patently unconstitutional" for the government to take action that has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who exercise them." 390 U.S. at 581. The only potential purpose, or effect, of a jury waiver is to save the resources necessary to conduct a trial by jury. This cannot count as a separate legitimate purpose. The fact that a constitutional right proves costly to protect is

not a reason to deny it or penalize defendants for exercising it, so long as guilt or innocence is at issue.

The District Court recognized this difference between plea bargains and jury waivers. "[W]hat is traded is not a confession of the truth of criminal allegations, but the very procedural safeguards we have enacted to protect the judicial process." *Corcoran*, 483 F. Supp. 2d at 722. It found that jury waivers are analogous to waivers of other individual constitutional rights, such as the right to counsel or the right to confront witnesses, not to plea bargains. *Id.* Waivers of all of these constitutional rights are included in a guilty plea, but that does not mean that it is legal for prosecutors to use the death penalty, or any increased penalty, to intimidate defendants into waiving them individually *Id.* It is unfathomable that a court would allow a prosecutor to use threats of pursuing the death penalty in order to coerce a defendant into waiving his right to counsel, his right to confront witnesses against him or his right to a public trial. Petitioner contends, and the district court agreed, that the facts in the present case present an equally unfathomable situation.

Jury waivers and guilty pleas differ greatly from a deterrence perspective as well. In order to deter future crime the expected benefit to the criminal must be less than the expected punishment. RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 219, (7th ed. 2007). The expected punishment is the actual punishment discounted by the probability that any particular criminal will actually face said punishment *Id.* at 221. Therefore, there are two ways in which an expected punishment can be adjusted for optimal deterrence. For example, to increase the expected punishment, the actual punishment can be increased, probability of punishment can be increased, or both. As the probability of punishment approaches one, the actual punishment should approach the expected benefit to the defendant of the crime. This explains why it makes

sense to offer lesser sentences to defendants who agree to plead guilty. Their probability of incarceration increases to one, so the optimal punishment should be less severe. This is not the case with a bench trial. In fact, a 2005 study shows that conviction rates are *lower* with federal bench trials. Andrew D. Liepold, *Why are Federal Judges so Acquittal Prone?*, 83 WASH U L Q 151, (2005). Consequently, from deterrence perspective it is unjustifiable to offer a lesser sentence in exchange for a jury waiver. This is further proof that the trial prosecutor's attempt to chill Petitioner into waiving his constitutional right to a jury was unnecessary and therefore excessive, violating the doctrine of unconstitutional conditions.

Respondent cannot dispute that the trial prosecutor failed to request an admission of guilt on the improper offer. Instead, the trial prosecutor wrongly attempted to chill Petitioner's exercise of a right Petitioner wanted – his right to a determination of his guilt or innocence by a jury. The second offer sought to penalize and chill the invocation of that right in violation of *Jackson*.

The Seventh Circuit failed to give meaningful effect to *Jackson*, and thus, the Seventh Circuit's reasoning represents a dramatic departure from this Court's *Jackson* authority and fundamentally conflicts with this Court's authority. *See* Sup. Ct. R. 10(a) and (c). This Court should grant the writ of certiorari not only to ensure meaningful and uniform enforcement of constitutional guarantees, but also to prevent the unseemly spectacle of a mentally ill defendant being sentenced to death where death only became the penalty when the mental ill defendant refused to waive his right to a jury trial. The Constitution protects against the state from penalizing defendants in such a manner and in turning Constitutional rights into an *a la carte* menu, the cost of invoking any guaranteed constitutional protection a higher potential sentence.

II. The Seventh Circuit's Majority Opinion Represents A Dramatic Departure From This Court's Precedent And Conflicts With This Court's Decision In *Wiggins* and *Miller-El*.

A state court decision constitutes an "unreasonable determination of the facts" under 2254 (d)(2) if the factual determination is either contradicted or unsupported by the record, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 528 (2003), or if the determination is objectively unreasonable in light of the evidence presented. In *Miller-El v. Dretke*, 535 U.S. 231, 241-52, 265 (2005), for example, this Court found the state court's "factual" determination that the prosecutor's reasons for striking black veniremen were race-neutral to be unreasonable determination of the facts, because, upon review, the prosecutions explanations were based upon a "mischaracterization" of juror testimony, "unsupported" by the voir dire record, and/or "unlikely" in light of the prosecutor's conduct or the jurors' testimony, and where the state court's interpretation of that evidence is "dismissive and strained."

The Majority Opinion violated these principles in evaluating the claim of whether Petitioner was competent to waive post-conviction proceedings in a capital case. The legal standard for competency is based on whether a defendant "has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from mental disease, disorder or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). Faithfully applying *Rees*, Petitioner was not competent to waive his state post-conviction proceedings.

Every expert witnesses opined that Petitioner was not competent. Petitioner suffers from a substantial mental illness, paranoid schizophrenia, with substantial delusions of torture and torment that form the basis of his waiver of post-conviction review. Petitioner's delusions

substantially impair his ability to make a reasoned decision, as testified to by the un-contradicted experts. Each expert testified that Petitioner was not competent, his schizophrenia prevented him from making rational choices. Additionally, each expert agreed that Petitioner's decision to waive post-conviction proceedings was based on his desire to die, in order to be free of his painful and terrifying paranoid delusions, and are the result of his deranged thought processes borne not out of reason but of his irrational, diseased mind. No evidence exists to the contrary. Thus, the Indiana Supreme Court unreasonably found Petitioner to be competent to waive post-conviction review and the conflicting conclusion of the Indiana Supreme Court is rebutted by clear and convincing evidence.

While the Indiana Supreme Court acknowledged Petitioner's paranoid schizophrenia (*Corcoran*, 820 N.E 2d at 660), the court concluded that Petitioner was competent to waive post-conviction review because: 1) Petitioner made no statement to any evaluating expert that he wanted to waive in order to escape the delusions (*id.* at 660); 2) prison treatment records demonstrate that medication was controlling his psychotic symptoms (*id.*); and 3) Petitioner was aware of his legal position and the consequences of a waiver (*Id.* at 660-662). These findings or basis for finding competence are not fairly supported by clear and convincing evidence in the record.

The Dissent accurately points out:

> The problem with the conclusion that Corcoran had the capacity to make a rational choice is that two of the court's three reasons are directly contradicted by the evidence presented. *See Mendiola v. Schomig*, 224 F.3d 589, 592 (7th Cir. 2000) ("If a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § *2254*."). First, the court reasoned Corcoran never told any of the experts that he wanted to die to escape his delusions. That is not true. Second, the court stated that each expert indicated Corcoran's medication controlled his psychotic symptoms. That also is not true.

Corcoran, at 716 (Williams, J , dissent).

As to the first basis provided by the Indiana Supreme Court, the record rebuts any such assertion. Rather as noted above, each expert testified that Petitioner wanted to waive his appeals in order to end the mental anguish caused by his undisputed delusions that the prison was torturing him *See supra* Indeed, the Indiana Supreme Court noted and made the contradictory finding that "each expert stated that Corcoran's decision to forego post-conviction review of his sentence, was premised on his desire to be relieved of the pain he believes he experiences as a result of his delusions" *Corcoran*, 820 N.E.2d at 660. The Seventh Circuit Dissent correctly noted that Petitioner made statements that he wanted to die to end the pain from his mental illness. *See Corcoran*, at 716 (Williams, J., dissent).

As to the second basis provided by the Indiana Supreme Court, the record demonstrates that the delusions causing the pain, from which Petitioner wants to escape and seeks to gain relief from, have not been impacted by the treatment he is receiving. Dr. Kaplan testified that the prison medical treatment records documented the *failure* of medication to control Petitioner's psychotic symptoms. PC Comp. TR. at 24. During cross, the State elicited the following:

> [Prosecutor] You testified that he is currently on medication?
>
> [Dr Kaplan] Yes.
>
> [Prosecutor] I think you characterized him as antipsychotic medication, is that right?
>
> [Dr. Kaplan] Geodon is an antipsychotic, and Trazadone is an antidepressant.
>
> [Prosecutor] Were you able to ascertain if these drugs were having an effect on him?
>
> [Dr Kaplan] Um, in looking at the prison medical records, they were having a variable effect. It seemed that, you know, sometimes he was

> more lucid than other times. But, *it didn't appear that at any time he was not paranoid or not delusional. That appeared that, that he didn't have a significant effect to that extent*

Id. at 33-34 (emphasis added). The Dissent correctly noted that Petitioner's paranoid schizophrenia is not under control by medication. *See Corcoran*, at 716 (Williams, J., dissent)

As to the third basis provided by the Indiana Supreme Court, the totality of the record rebuts any such assertion by clear and convincing evidence. The Indiana Supreme Court primarily relied upon the colloquy between the trial court and Petitioner in making such a finding. The experts who interviewed, tested and evaluated Petitioner challenge the assumptions from the colloquy. As noted by Dr. Kaplan, Petitioner's paranoid schizophrenia is "creating a reality in his mind that doesn't exist, and on the basis of the reality that doesn't exist, he is making decisions about whether he wishes to proceed...." PC Comp TR. at 16-17. Dr. Kaplan noted that Petitioner was "trying to that he was trying to cover up his psychological symptoms and tried to look better than he really was." *Id.* at 28. Dr. Parker, stated that Petitioner "does his best to minimize the severity of his symptoms, to downplay that he might have any mental disorder...it is better for him psychologically to appear that he is criminally responsible, than to admit that he has a serious mental illness..." *Id.* at 56-57.

Dr. Coons, a psychiatrist that testified at the 1999 sentencing hearing, indicated Petitioner attempted to conceal his grossly psychotic delusions and hallucinations. "[T]he person with paranoid schizophrenia generally minimizes their symptoms and doesn't bring attention to them...unless you know what door to open, what question to ask, you may well miss it because they keep it to themselves. And that was true of Mr. Corcoran. Had I not known about some kind of sleep problem, I don't think I would have uncovered this delusional system." TR at 2706. At Petitioner's guilt phase trial, Dr. Engum testified that Petitioner "he's trying to mask it. He's

trying to hide it. He's very secretive, again consistent with paranoia and suspiciousness." TR 2318.

Every expert warned against relying upon a "snapshot" to determine competency, because Petitioner would minimize his illness in order to provide an escape from his illness by bringing about death. In short and according to all the expert testimony, a "snapshot" cannot be used to base a competency finding upon given the full record to the contrary. As the Seventh Circuit Dissent correctly recognized, the overwhelming testimony, including pre-dating the competency hearing, was that Petitioner minimized and denied his mental illness at every turn. *See Corcoran*, at 717 (Williams, J., dissent) ("Rather, the person whom the court credited was a person diagnosed with a severe mental illness that causes delusions, who told a doctor and his sister he wanted to die to escape those delusions. The medical experts who evaluated Petitioner testified he purposely downplays his illness and is intelligent enough to know how to hide his psychosis."). Dr. Kaplan noted that Petitioner was "trying to cover up his psychological symptoms and tried to look better than he really was." PC Comp. TR. at 28. Dr. Parker, stated that Petitioner "does his best to minimize the severity of his symptoms, to downplay that he might have any mental disorder. ...it is better for him psychologically to appear that he is criminally responsible, than to admit that he has a serious mental illness..." *Id.* at 56-57. Dr. Haskins testified that Petitioner was indeed "attempting to minimize the severity of his underlying psychosis," and did so "[i]n order to escape from his [his delusions] . . [by] bring[ing] about his own death." *Id.* at 68, 71.

Because Petitioner can show that the state court determined the underlying factual issue against the clear and convincing weight of the evidence, he has established that the court committed error in reaching a decision based on that faulty factual premise. A state court

decision that rests upon a determination of fact that lies against the clear weight of the evidence is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable.

Simply put, what this Court recognized in *Miller-El* has happened here. And as noted by the Seventh Circuit Dissent, in Petitioner's case:

> The Indiana Supreme Court unreasonably concluded that Corcoran had the ability to make a rational choice based on these two erroneous factual premises. "[E]ven a partial reliance on an erroneous fact finding can support a finding of unreasonableness." *Ben-Yisrayl v. Buss, 540 F.3d 542, 550 (7th Cir. 2008)* (discussing *Wiggins v. Smith, 539 U.S. 510, 528, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*); *see also Mendiola, 224 F.3d at 592-93* (state court's finding should be supported by the record).

See Corcoran, at 716-717 (Williams, J., dissent).

The Seventh Circuit failed to give meaningful effect to *Wiggins* and *Miller-El*, and thus, the Seventh Circuit's reasoning fundamentally conflicts with this Court's authority. Pursuant to Sup. Ct. R. 10(c), this Court should grant Petitioner's Writ of Certiorari.

III. This Court Should Remand this Matter Back to the District Court or the Court of Appeals And Require the Consideration of Federal Constitutional Claims Which Are colorable and not procedurally defaulted.

The District Court granted relief based on *United States v. Jackson*, 390 U.S. 570 (1968), denied relief on Petitioner's competency claim, and declined to address four (4) of Petitioner's Habeas Grounds, Grounds 2, 3, 4, and 7, on the basis that they were rendered moot by the granting of relief. *Corcoran v. Buss*, 483 F.Supp. 2d 709, 734 (N.D. Ind. 2007). Of these four claims, Habeas Ground 2 and 3 are both exhausted and **not** procedurally defaulted.

This is not a unique scenario or circumstance. In *Stewart v. Peters*, 1992 U.S. APP. LEXIS 6330 (7th Cir. 1992) (Attached in Apx.-48), the Seventh Circuit faced an identical procedural circumstance. While denying *en banc* consideration, the Seventh Circuit granted

Panel rehearing and held as follows:

> In the last sentence of the panel opinion issued on February 27, the judgment of the district court is "reversed with directions to deny the petition for habeas corpus." The petition for rehearing points out, and the state's response confirms, that the petitioner had presented in the district court alternative grounds for habeas corpus which the district judge had not passed on...we hereby modify our decision to make it a simple reversal and remand for further proceedings consistent with our opinion, thus leaving it to the district judge to decide in the first instance what further proceedings are proper in this case. In all other respects the petition for rehearing is denied.

Stewart, 1992 U.S. APP. LEXIS 6330 at *1-*2.

Petitioner's 3rd Habeas Ground presents a constitutional challenge to Indiana's new death penalty statute that is an issue of first impression, not only for the Seventh Circuit, but also for either the Indiana Southern and Northern Federal District Courts. Indeed, no federal court of competent jurisdiction in any case has considered the precise arguments raised in Petitioner's 3rd Habeas Ground, which is exhausted and not procedurally defaulted. In addition, Petitioner's 2nd Habeas Ground alleges an *Eddings* error similar to the error upon which the Seventh Circuit granted relief in *Wright v. Walls*, 288 F.3d 937 (7th Cir. 2002).

This Court recently castigated the Sixth Circuit for limiting its merits review of a *Brady* claim to the guilt phase, and not assessing the penalty phase. As a result, this Court remanded for a consideration of the yet to be considered *Brady* consideration at the penalty phase. *See Bell v. Cone*, 2009 U.S. LEXIS 3298 at *48 (2009) ("Neither the Court of Appeals nor the District Court fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone's drug addiction -- especially if attributable to honorable service of his country in Vietnam -- was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death. Because the evidence suppressed at Cone's trial may well have been material to the jury's assessment of the proper punishment in this case, we conclude that a full

review of the suppressed evidence and its effect is warranted.")

Pursuant to *Bell*, Petitioner requests this Court to grant certiorari, vacate and remand the Seventh Circuit Opinion with directions that the district court address the merits of Petitioner's remaining claims on the merits. In sum, there is no merit to the State's waiver argument. A person should not be executed with substantial and timely presented constitutional claims left wholly unexamined.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's petition and issue a writ of certiorari to review the Seventh Circuit's decision. Alternatively, this Court should grant the writ and remand this case back to the district court for a merits review of the non-procedurally defaulted and properly presented federal constitutional claims that to date have never been addressed

Respectfully submitted,

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No. 08-9369

In The Supreme Court Of The United States

JOSEPH EDWARD CORCORAN,

Petitioner,

v.

MARK A. LEVENHAGEN, Warden,

Respondent.

Supreme Court, U.S.
FILED
MAY 18 2009
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via regular U.S. Mail, on this 16 day of May, 2009 upon: Mr. James Martin, Office of the Attorney General, 302 W. Washington St., 5th Floor, Indianapolis, IN 46204. All persons required to be served have been served.

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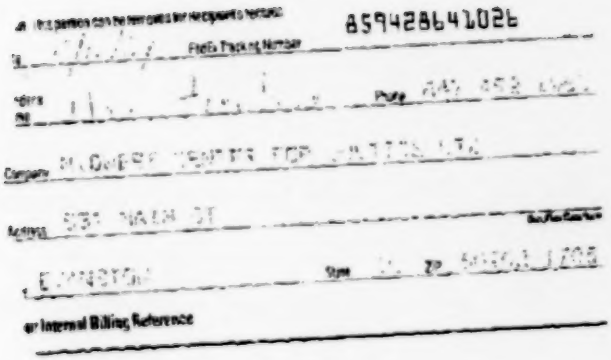

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Content of Appendix

Corcoran v Buss, 483 F.Supp.2d 709 (S.D. Ind. 2007)..... Apx. 1-19

Corcoran v Buss, 551 F 3d 703 (7th Cir. 2008) ..... Apx. 20-29

February 24, 2009 Rehearing Order of the Seventh Circuit Court of Appeals..... Apx. 30

Corcoran v State, 739 N.E.2d 649 (Ind. 2000)..... Apx. 31-36

Corcoran v State, 820 N.E 2d 655 (Ind. 2005)..... Apx 37-47

Stewart v Peters, 1992 U.S. APP. LEXIS 6330 (7th Cir. 1992) ..... Apx. 48

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JOSEPH EDWARD CORCORAN, Petitioner, v. ED BUSS, Respondent.

CAUSE NO. 3:05-CV-389 AS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

483 F. Supp. 2d 709; 2007 U.S. Dist. LEXIS 26768

April 9, 2007, Decided
April 9, 2007, Filed

SUBSEQUENT HISTORY: Affirmed in part and reversed in part by, Remanded by, Habeas corpus proceeding at *Corcoran v. Buss, 2008 U.S. App. LEXIS 26824 (7th Cir. Ind., Dec. 31, 2008)*

PRIOR HISTORY: *Corcoran v. State, 845 N.E.2d 1019, 2006 Ind. LEXIS 396 (Ind., 2006)*

COUNSEL: [**1] For Joseph Edward Corcoran, Petitioner: Alan M. Freedman PHV, LEAD ATTORNEY, Midwest Center for Justice Ltd, Evanston, IL., Laurence E. Komp PHV, LEAD ATTORNEY, Attorney at Law, Manchester, MO.

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For Ed Buss, Respondent: Stephen R. Creason, LEAD ATTORNEY, James B. Martin, Indiana Attorney General's Office - IAG/302, Indianapolis, IN.

Joseph Edward Corcoran, Miscellaneous Party, Pro se, Michigan City, IN.

JUDGES: ALLEN SHARP, JUDGE

OPINION BY: ALLEN SHARP

OPINION
[*712]

DEATH PENALTY CASE

OPINION AND ORDER

This proceeding is a habeas corpus petition filed by counsel on behalf of the petitioner, Joseph Edward Corcoran, seeking relief under *28 U.S.C. § 2254* from a state court criminal proceeding in which he was sentenced to death. Oral argument was held on the petition in Lafayette, Indiana on March 19, 2007. This court greatly appreciates the work of all counsel in this difficult matter, but specifically notes the able services rendered by appointed counsel for Mr. Corcoran.

I. FACTUAL AND PROCEDURAL BACKGROUND

[**2] The procedural history of this case is unusual and more convoluted than normal so it is particularly important to lay it out fully here. There are five published opinions of the Supreme Court of Indiana related to this case.

Corcoran v. State, 739 N.E.2d 649 (Ind. 2000)

Corcoran v. State, 774 N.E.2d 495 (Ind. 2002)

Corcoran v. State, 820 N.E.2d 655 (Ind. 2005)

Corcoran v. State, 827 N.E.2d 542 (Ind. 2005)

Corcoran v. State, 845 N.E.2d 1019 (Ind. 2006)

Each will be discussed later in this opinion as necessary The state record has been filed and examined here pursuant to the mandates of *Townsend v Sain, 372 U S 293, 83 S Ct. 745, 9 L Ed 2d 770 (1963)*, as well as *28 U S C § 2254*

> Joseph E Corcoran was under stress because his sister's upcoming marriage would necessitate his moving out of her house And his brother said Corcoran could not move in with him
>
> He awoke one afternoon to hear his brother and others downstairs talking about him. Irritated, he loaded his rifle and went downstairs to intimidate them, but as Corcoran said later, "It [**3] just didn't happen that way" (R at 1988) Corcoran killed his brother, his sister's fiance, and two other men in the ensuing incident

Corcoran v State, 774 N E 2d 495, 497 (Ind. 2002).

> On July 26, 1997, Corcoran was lying on his bedroom floor and heard men's voices He became upset because he thought the men were talking about him and took a semi-automatic rifle downstairs to confront them In the living room were four men, including Corcoran's brother and future brother-in-law, both of whom lived in the house with Corcoran
>
> Corcoran shot and killed Jim Corcoran, Scott Turner and Timothy Bricker at close range The final victim, Doug Stillwell, tried to escape, but Corcoran chased him into the kitchen and shot him in the head

Corcoran v State, 774 N E 2d 495, 501 (Ind 2002)

On July 31, 1997, Mr Corcoran was charged with four counts of murder Trial Record at 29-36 Nine and a half months later, on May 11, 1998, the state withdrew from negotiations with the defendant. Trial Record at 151 Two days later, on May 13, 1998, the state filed four applications for the death penalty Trial Record at 111-118 On May 10, 1999, the [**4] state filed four amended applications for the death penalty which were granted on May 13, 1999. Trial Record at 369-377 Jury Selection began on May 17, 1999 Trial Record 664 The selected jury was sworn on May 19, 1999. Trial Record at 1605-06 The trial, under cause number 02D04-9707-CF-465 began on May 20, 1999 Trial Record at 1609 The jury went out at 10 40 A M on May 22, 1999 Trial Record at 2207 Less than an hour later, Mr. [*713] Corcoran was found guilty on all four counts of murder Trial Record at 460-63, 2209-10, and 2214. The penalty phase began on May 24, 1999 Trial Record at 2215 The jury went out at 9 30 a m. on May 25, 1999. Trial Record at 2522 Less than two hours later, the jury recommended the death penalty on all four counts Trial Record at 556-59, 2525-29, and 2533 On August 26, 1999, the judge imposed the death sentence Trial Record at 2573-78

On direct appeal, Mr Corcoran sought review of only his death sentence By counsel, he explicitly waived an appeal of the findings of guilt Appendix to Appellant's Brief, file marked March 30, 2004, at 205 In his affidavit, he stated,

> [A]t this time I confirm my position that I do wish to waive my appeal [**5] of the underlying murder convictions in this case . I am requesting a review of my sentencing in this case I understand that a waiver of my murder convictions is a final decision and is irreversible

Appendix to Appellant's Brief, file marked March 30, 2004, at 206. His appellate brief closed by asking, "that the death penalty in this case should be set aside and requests the Court to do so." Docket # 32-3 at 69 The Supreme Court of Indiana recognized that Mr Corcoran did not seek review nor reversal of his convictions.

> Appealing from the trial court judgment, the defendant does not challenge the guilt phase proceedings or his resulting convictions His appellate claims concern only the penalty and sentencing proceedings and his death sentence.

Corcoran v State, 739 N E 2d 649, 651 (Ind 2000)

On December 6, 2000, a unanimous Indiana Supreme Court vacated the death sentences and remanded the case for re-sentencing. *Corcoran v State, 739 N E 2d 649 (Ind 2000)* Justice Dickson wrote the opinion and was joined by three other justices, Chief Justice Shepard concurred in the decision with a separate opinion [**6]

> From the combination of the trial court's remarks in open court that she was "convinced in her heart of hearts" that the defendant, "if given the opportunity, would murder again," Record at 2916, and of the court's written references in the sentencing statement to the innocence of the vic-

> tors and the heinousness of the murders, we find a significant possibility that the trial court may have relied upon non-statutory aggravating factors in deciding whether to impose the death penalty. We therefore remand this cause to the trial court to redetermine from the evidence already presented whether to impose the death sentence, life without parole, or a term of years, based only upon mitigating and proper aggravating circumstances, and to issue a new sentencing statement.

Corcoran v. State, 739 N.E.2d 649, 657 (Ind. 2000)

On September 30, 2001, Mr. Corcoran was resentenced to death. Supplemental Record at 46-50. Again the case returned to the Indiana Supreme Court which affirmed on September 5, 2002. *Corcoran v. State, 774 N.E.2d 495 (Ind. 2002)*. Chief Justice Shepard wrote the opinion and was joined by three other justices. Justice Rucker [**7] dissented with a written opinion. He began by stating "I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness." *Corcoran v. State, 774 N.E.2d 495, 502 (Ind. 2002)* (Rucker J., dissenting). The petition for rehearing was denied in an unpublished opinion on March 4, 2003. Docket # 1-4.

On May 8, 2003, the trial court submitted a proposed case management schedule to the Supreme Court of Indiana. Docket # 32-14 at 3. On May 30, 2003, the Supreme [*714] Court of Indiana approved the proposed case management schedule and set the date for filing a petition for post-conviction relief for September 9, 2003. Docket # 32-14 at 4. On August 27, 2003, post-conviction counsel filed a motion seeking to extend that deadline stating,

> Due to our client's mental illness outlined in the Notice of Intent filed on April 2, 2003, counsel's ability to 'confer with petitioner and ascertain all grounds for relief' pursuant to Ind. Post-Conviction Rule 1(9)(c) and to fulfill our duty to investigate the case pursuant to ABA Standards for Criminal Justice Prosecution Function and Defense Function 4-4.1 has been severely inhibited. [**8] This obstacle makes it extremely difficult for counsel to file an initial Petition for Post-Conviction Relief by September 9, 2003.

Appendix to Appellant's Brief, file marked March 30, 2004, at 55-56. That motion was denied by the post-conviction court on August 29, 2003. Appendix to Appellant's Brief, file marked March 30, 2004, at 58.

On September 9, 2003, the last day before the deadline expired, post-conviction counsel filed an unverified Petition for Post-Conviction Relief. Appendix to Appellant's Brief, file marked March 30, 2004, at 88-136 and also 142-190. At the same time, counsel also filed a motion to determine competency, stating, "Joseph E. Corcoran did not sign his Petition for Post-Conviction Relief ..." Appendix to Appellant's Brief, file marked March 30, 2004, at 59. On September 30, 2003, the post-conviction court struck the post-conviction relief petition.

> Pursuant to the Supreme Court's Order of May 30, 2003, approving the Trial Court's Case Management Schedule, the defendant was to file his Petition for Post-Conviction Relief on or before September 9, 2003.
>
> On September 9, 2003, counsel for the defendant filed, by certified mail, documents entitled [**9] "Petition for Post-Conviction Relief" and "Verified Motion to Determine Competency."
>
> The document entitled "Petition for Post-Conviction Relief is neither signed by the defendant, nor verified to contain all grounds known to defendant for vacating, setting aside, or correcting the conviction and sentence.
>
> Pursuant to long standing case law, [the most recent being *White v. State, 793 N.E.2d 1127 (Ind. App. 2003)*] and the rules governing post-conviction relief requiring signature by the defendant and verification, the Court orders the Petition returned to counsel, stricken from the record and notifies the Supreme Court by this Order of the defendant's failure to comply with the Trial Court's Case Management Schedule, and his failure to comply with the Rules for Post-Conviction Relief.
>
> The pleading entitled "Verified Motion to Determine Competency" has been set for hearing October 21, 2003 at 1:30 p.m. Defense counsel have cited no Indiana law in their brief, relying on cases from the United States Supreme Court, 2nd, 5th, 7th, 8th, 9th, and 10th Circuit

> Court of Appeals and State cases from Oklahoma and Wisconsin The State has filed no responsive pleading, and [**10] is ordered to do so by October 15, 2003

Appendix to Appellant's Brief, file marked March 30, 2004, at 80 (brackets in original)

On October 21, 2003, the state post-conviction court held a hearing on the motion to determine competency Mr Corcoran testified under oath and said,

> See, I want to waive my appeals because I am guilty of murder. I think that I should be executed for what I have done and not because I am supposedly [*715] tortured with ultrasound or whatever I am guilty of murder. I should be executed That is all there is to it That is what I believe. I believe the death penalty is a just punishment for four counts of murder, and I believe that I should be executed since I am guilty of four counts of murder

Post-conviction transcript dated October 21, 2003 at 89 On December 19, 2003, the post-conviction court held a follow-up hearing and issued a written order finding Mr. Corcoran competent In the written opinion, the court noted that, "The evidence is clear that the Defendant suffers from a mental illness." Appendix to Appellant's Brief, file marked March 30, 2004, at 247

> The issue before this Court, however, is not whether the Defendant suffers [**11] from a mental illness, but rather whether he is competent to waive post-conviction review of his convictions and death sentence The statutes governing comprehension to stand trial, and the case law interpreting those statutes indicate, if a Defendant understands the nature of the proceedings and is able to assist counsel in the preparation of his defense, then that Defendant is competent to stand trial The trial Court's observations of the Defendant and the Defendant's own comments and statements may also be considered in a competency determination
>
> The dialogue the State and the Court had with the defendant clearly indicate he is competent and understands what he is doing While his choice of action may be unwise, and obviously against the advice of counsel, he is competent to make this ultimate decision in spite of his mental illness

Appendix to Appellant's Brief, file marked March 30, 2004, at 247-48 At the hearing, after finding that Mr Corcoran was competent, the judge offered him an opportunity to sign the post-conviction relief petition and proceed Mr Corcoran stated, "I don't want to appeal." Post-conviction transcript dated December 19, 2003 at 10

[**12] Thereafter, his attorneys appealed the determination of competency

> On November 16, 2004, Corcoran filed a request with this Court, accompanied by an affidavit indicating his intention to pursue post-conviction relief after all, asking us to dismiss this appeal of the trial court's competency determination as moot and return this case to that court for post-conviction proceedings

Corcoran v State, 820 NE 2d 655, 658 (Ind 2005) That request was denied The Indiana Supreme Court affirmed the finding of competency Justice Sullivan wrote the opinion and was joined by three other justices, Justice Rucker dissented with a lengthy opinion He began by stating, "I respectfully dissent because I believe Corcoran is not competent to waive his right of post-conviction review." *Corcoran v State, 820 NE 2d 655, 665 (Ind 2005)* (Rucker J , dissenting). The petition for rehearing was denied in a published opinion on May 12, 2005 *Corcoran v State, 827 NE 2d 542 (Ind 2005)* Justice Sullivan wrote the opinion and was joined by three other justices; Justice Rucker dissented with a brief opinion based on the reasons previously [**13] stated and because "it essentially forecloses any chance that Corcoran may obtain post-conviction review of his conviction and sentence." *Corcoran v State, 827 NE 2d 542, 547 (Ind 2005)* (Rucker, J , dissenting)

On February 10, 2005, Corcoran filed a signed post-conviction relief petition Appendix to Appellant's Brief, file marked September 27, 2005, at 315-62 The post-conviction court dismissed it as untimely

> After a review of these pleadings, the Supreme Court's May 12, 2005 Opinion, [*716] the Supreme Court Order approving the trial court's case management schedule, the trial court finds the Petition for Post-Conviction Relief filed on Febru-

any 10, 2005 is untimely (Seventeen (17) months past the September 9, 2003 deadline)

Pursuant to the Supreme Court approved case management schedule, defendant was required to file a proper Petition for Post-Conviction relief on or before September 9, 2003 As defendant did not comply with this required deadline, the Petition filed February 10, 2005 is ordered dismissed as time-barred

Appendix to Appellant's Brief, file marked September 27, 2005, at 390-91 Returning to the Supreme Court of Indiana, the court [**14] affirmed on April 18, 2006. Justice Sullivan again wrote the opinion and was joined by three other justices, Justice Rucker dissented without a separate opinion *Corcoran v State, 845 N E 2d 1019 (Ind 2006)*

II TIMELINESS OF THIS HABEAS CORPUS PETITION

On June 27, 2005, counsel for Mr Corcoran initiated these habeas corpus proceedings The court feels compelled to note at this point that this habeas corpus petition is seriously untimely Habeas Corpus petitions are subject to a one year statute of limitations

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized [**15] by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection

28 U S C § 2244(d)

Here, the 1-year period of limitation ran from the date on which the judgment became final at the expiration of the time for seeking direct review pursuant to subparagraph A There has been no argument presented to this court nor any factual basis in this record to indicate that the state prevented Mr Corcoran from filing a application for a writ of habeas corpus anytime he so wanted. Though the confusion over Mr Corcoran's post-conviction relief petitions may have been a distraction, they in no way obstructed him from filing a habeas corpus petition; therefore subparagraph B is not applicable. There [**16] is no argument here based on a newly recognized constitutional right made retroactively applicable to cases on collateral review, therefore subparagraph C is not applicable Finally, there is no argument here based on newly discovered evidence; therefore subparagraph D is not applicable

After conviction and sentencing, Mr Corcoran took a direct appeal which resulted in remand for resentencing followed [*717] by a second direct appeal The Supreme Court of Indiana affirmed, later it denied his petition for rehearing on March 4, 2003 The United States Supreme court has noted favorably that, "The Courts of Appeals have uniformly interpreted 'direct review' in *§ 2244(d)(1)(A)* to encompass review of a state conviction by this Court." *Clay v. United States, 537 U S 522, 528, n 3, 123 S. Ct 1072, 155 L Ed 2d 88 (2003), see also Lawrence v Florida, U S , 127 S Ct 1079, 1084, 166 L Ed 2d 924 (2007).* Therefore the time for seeking direct review of his conviction did not expire until the passage of the ninety days for filing a petition for certiorari Allotting those ninety days, the 1-year period of limitation began to run on June 3, 2002

28 U S C § 2244(d)(2) [**17] provides for tolling during the time in which a "properly filed" State post-conviction petition is pending, but "[a] collateral attack that is untimely under state law is not 'properly filed'" *Brooks v Walls, 279 F 3d 518, 521 (7th Cir 2002)* As the Supreme Court of Indiana made clear in several opinions, Mr Corcoran did not ever have a properly filed postconviction petition *Corcoran v State, 820 N E 2d*

655 (Ind 2005), Corcoran v State, 827 N E 2d 542 (Ind 2005), and *Corcoran v State, 845 N E 2d 1019, 1024 (Ind 2006)* ("We affirm the post-conviction court's dismissal of Joseph Corcoran's February 10, 2005 petition for post-conviction relief We hold that the February 10, 2005 petition does not relate back to the unverified September 9, 2003 petition as the latter was not timely filed.") Therefore nothing tolled the 1-year period of limitation and it expired on June 3, 2004

Therein lies the problem This habeas corpus proceeding was not initiated until more than a year later on June 27, 2005 The Supreme Court has upheld the validity of the statute of limitations found in *28 U S C § 2244(d)* [**18] , even where it cuts off all federal review of a death sentence *See Lawrence v Florida, U S . , 127 S Ct 1079, 1084, 166 L Ed 2d 924 (2007)*. Nevertheless, the respondent did not raise this issue, not mention in this proceeding whether the petition was timely "A statute of limitations defense . is not 'jurisdictional,' hence courts are under no obligation to raise the time bar *sua sponte*." *Day v McDonough, 547 U S 198, . 126 S Ct 1675, 1681, 164 L Ed 2d 376 (2006)* Therefore, "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day v McDonough, 547 U S 198, . 126 S Ct. 1675, 1684 (2006)*.

In *Day*, the respondent erroneously calculated the time and the Supreme Court held that where "there was merely an inadvertent error, a miscalculation that was plain" *Day v McDonough, 547 U S 198, . 126 S Ct. 1675, 1685 (2006)*, the court could, in its discretion and with procedural limitations, raise the 1-year period of limitation *sua sponte* Nevertheless, where [**19] a state has intelligently chosen to waive this defense, a court is not "at liberty to disregard that choice." *Day v McDonough, 547 U S 198, . 126 S Ct 1675 1685 (2006)*

Here, the respondent has not miscalculated because there is no calculation nor even any mention as to timeliness in the respondent's brief Nevertheless, it does not appear that the omission was inadvertent because during the inchoate state post-conviction proceedings, the respondent, on May 25, 2005, included this footnote in a memorandum seeking the dismissal of the February 10, 2005 post-conviction relief petition

> [*718] In addition to Corcoran's time bar for post conviction review, any federal habeas petition will similarly be time-barred under *28 U S C § 2244(d)*. That statute of limitations requires any federal habeas petition to be filed within one year of the denial of certiorari review in the U S. Supreme Court on direct appeal. While the proper filing of a state post-conviction petition tolls that limitations period during the time which the post-conviction petition is pending in state court, Corcoran allowed more than one-year to pass before [**20] filing a state post-conviction petition (even assuming that the instant petition was properly filed under the meaning of the federal statute), so any federal habeas petition is time-barred in its own right. *See e g , Pace v DiGuglielmo, 544 U S [408], 125 S Ct 1807, 161 L Ed 2d 669 (2005)*

Appendix to Appellant's Brief, file marked September 27, 2005, at 388 This footnote clearly demonstrates that the respondent was aware that this habeas corpus petition was untimely Therefore it appears that the respondent chose to waive this defense However, because this issue was not addressed by counsel, it is at least theoretically possible that it was an inadvertent omission Nevertheless, because the respondent had actual knowledge of the untimeliness of the petition, yet did not raise this defense in the return, the court will not exercise any discretion that it might have to address this petition's untimeliness other than to note it for the record

III. STANDARD OF REVIEW

Certainly as a generalized proposition, the facts found by the highest court of the State of Indiana are entitled to a rebuttable presumption of correctness under *28 U S C § 2254(e)(1)* [**21] , and the burden is on the petitioner in that issue to otherwise show the same by clear and convincing evidence

> AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *28 U S C § 2254(d)(1)*. A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result A state-court decision involves an unreasonable application of this Court's clearly es-

tablished precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner.

Brown v Payton, 544 U S 133, 141, 125 S Ct 1432, 161 L Ed 2d 334 (2005) (citations omitted).

> As we have explained, a federal habeas court may [**22] not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied a [United States] Supreme Court case incorrectly Rather it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner

Price v Vincent, 538 U S 634, 641, 123 S Ct 1848, 155 L Ed 2d 877 (2003) (quotation marks, citations and brackets omitted)

Thus, the United States Supreme Court has made clear that it is not for this court to decide the merits of the petitioner's arguments from scratch Rather, the task laid out before this court in a *§ 2254* habeas corpus petition is to determine whether [*719] the decision of the state court, in this case the Supreme Court of Indiana, falls outside of that broad swath of reasonable interpretations of the law based solely on the holdings of United States Supreme Court opinions at the time of the state court decision

Additionally, there is the question of procedural default where a petitioner has not properly raised a question before the state's highest court

> Inherent in the habeas petitioner's obligation to exhaust his state court remedies before [**23] seeking relief in habeas corpus, *see 28 U S C § 2254(b)(1)(A)*, is the duty to fairly present his federal claims to the state courts *Baldwin v Reese, 541 U S 27, 124 S Ct 1347, 158 L Ed 2d 64 (2004)*; *O'Sullivan v Boerckel, 526 U S 838, 844-45, 119 S Ct 1728, 144 L Ed 2d 1 (1999)*, *Picard v Connor, 404 U S 270, 275, 92 S Ct 509, 30 L Ed 2d 438 (1971)* "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in the federal habeas proceeding does it make sense to speak of the exhaustion of state remedies" *Id at 276* Fair presentment in turn requires the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings *Boerckel, 526 U S at 845* This means that the petitioner must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory *Ibid*

A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim *See* [**24] *id at 848-49, see also, e g , Howard v O'Sullivan, 185 F 3d 721, 725 (7th Cir 1999), Momient-El v DeTella, 118 F 3d 535, 541 (7th Cir 1997)*. A procedural default will bar federal habeas relief unless the petitioner can demonstrate both cause for and prejudice stemming from that default, *Wainwright v Sykes, 433 U S 72, 86-87, 97 S Ct 2497, 53 L Ed 2d 594 (1977)*, or he can establish that the denial of relief will result in a miscarriage of justice, *Murray v Carrier, 477 U S 478, 495-96, 106 S Ct. 2639, 91 L Ed 2d 397 (1986)* Cause for a default is ordinarily established by showing that some type of external impediment prevented the petitioner from presenting his federal claim to the state courts. *Id at 488, 492* Prejudice is established by showing that the violation of the petitioner's federal rights "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions" *United States v Frady, 456 U S 152, 170, 102 S Ct 1584, 71 L Ed 2d 816 (1982)* (emphasis in original). In order to show, alternatively, that a miscarriage of justice would result if habeas relief is foreclosed, the petitioner must [**25] show that he is actually innocent of the offense for which he was convicted, *i e*, that no reasonable juror would have found him guilty of the crime but for the error(s) he attributes to the state court *Schlup v Delo, 513 U S 298, 327-29, 115 S Ct 851, 130 L Ed 2d 808 (1995)*

Lewis v Sternes, 390 F 3d 1019, 1025-1026 (7th Cir 2004) (parallel citations omitted)

IV. GROUND 1 - *SIXTH AMENDMENT* JURY TRIAL RIGHT

The petitioner argues that, "Indiana unconstitutionally sought to chill or squelch the assertion of his constitutional right to a jury trial by penalizing Petitioner with a death sentence for exercising that right." Petition at 10, docket # 13. The respondent argues that, "the Indiana Supreme [*720] Court correctly recognized that the United States Supreme Court, in jurisprudence rendered approximately a decade in the wake of *[United States v.] Jackson [, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)]*, unambiguously approved of a prosecutor's ability to offer lenency in plea negotiations." Return at 15, docket # 33. The Supreme Court of Indiana addressed this argument in Corcoran's first direct appeal:

> The defendant contends that Indiana's death penalty scheme [**26] impermissibly infringes, facially and as applied, upon the right to jury trial. He argues that, because identical factors may support a prosecutor's decision to seek either death or life imprisonment, the statute enables prosecutors to seek the death penalty "to coerce an individual who refuses to plead guilty to relinquish a constitutional right" to jury trial. Brief of Appellant at 46. The defendant asserts that in his case he declined the State's offer to accept a guilty plea or try his case to the bench and thereby avoid the death penalty. He urges that because the prosecutor thus believed that life imprisonment was the appropriate penalty, the request for the death penalty had no basis except to provide "a strategic advantage . . . to force the defendant to abdicate a basic right." Brief of Appellant at 47.
>
> We disagree. Prosecutors are traditionally given wide discretionary power in our criminal justice system to select the persons to be prosecuted and to plea-bargain with them. The Supreme Court has recognized the benefits of efficiency and speedy dispositions that plea-bargaining offers, and has fully approved its use as long as it is accompanied by safeguards that insure [**27] full knowledge on the part of the defendant offering a guilty plea as to his rights, his consequent waiver of those rights, the crime to which he is pleading guilty, and the maximum penalty or the extent to which he places himself at risk. *Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)*. In the context of plea-bargaining, we do not see a material distinction in the discretionary powers of the prosecutor in offering to agree to a lesser sentence for a guilty plea or for a bench trial. Our case law, which proscribes the imposition of a harsher sentence because a defendant exercised his right to jury trial, is rightly focused on the actions of the judge as sentencer and not the prosecutor as charger. *See Hill v. State, 499 N.E.2d 1103, 1107 (Ind. 1986)* ("Whether the severity of a particular sentence was improperly influenced by a defendant's jury trial election requires an individualized consideration." *Id.* Factors to be considered are (1) the role the judge played in the plea negotiations, (2) whether the judge encouraged the defendant to plead guilty, (3) the presence of threats from the judge of a more severe sentence [**28] if convicted following a jury trial, and (4) any evidence that the trial judge penalized the defendant for going to trial. *Pauley v. State, 668 N.E.2d 1212, 1213 (Ind. 1996), [Hill v. State], 499 N.E.2d [1103] at 1107 (Ind. 1986)*).
>
> The defendant did not waive his right to jury trial and fails to point to anything in the record that indicates he received a more severe sentence from the court because he exercised his right to jury trial. Absent a specific showing that a particular sentence was improperly influenced by the defendant's exercise of his right to jury trial, which is not presented here, we decline to reverse.

Corcoran v. State, 739 N.E.2d 649, 654 (Ind. 2000) (emphasis added).

It is of critical importance to note that the Supreme Court of Indiana recognized [*721] that the petitioner faced two distinct offers from the prosecutor prior to trial. First, he was offered the opportunity to plead guilty. In exchange the prosecutor would not seek the death penalty. Second, he was offered the opportunity to waive his right to a jury trial and proceed with a bench trial. In exchange the prosecutor would not seek the death [**29] penalty.

The first offer is common in our system of justice. It is widely accepted and the petitioner does not argue here that the offered plea bargain was unconstitutional.

Clearly it was not. It is well within prosecutorial discretion to offer to waive the death penalty in exchange for a guilty plea. "The power of a court to accept a plea of guilty is traditional and fundamental. Its existence is necessary for the practical administration of the criminal law." *United States v. Jackson, 390 U.S. 570, 584-85, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)* (quotation mark and ellipsis omitted).

> Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea [**30] may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.
>
> While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable -- and permissible -- attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Bordenkircher v. Hayes, 434 U.S. 357, 363-364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) (citations, quotation marks, and brackets omitted). Nothing in this opinion should be read to undermine or impugn the legitimacy of the process whereby a prosecutor negotiates with a criminal defendant to obtain a guilty plea.

But a guilty plea was not the object of the second offer. That offer did not ask nor require [**31] the defendant to plead to anything, it only asked him to waive his right to a jury trial and proceed with the judge as the factfinder. Such an offer is not common. Indeed, the court has neither found nor been cited to any other case where a prosecutor sought to induce a defendant to waive only his right to a jury trial in exchange for avoiding the possibility of the death penalty, or anything else. Neither can such an offer be considered a plea bargain since no plea is involved. It was not a confession that was asked of the defendant, but rather only a waiver of his right to a trial by jury.

At first blush, the question arises, what harm is caused by such an offer? If a defendant can trade away a panoply of rights by pleading guilty, why can he not trade away but one of them? The Supreme Court of Indiana said, "In the context of plea-bargaining, we do not see a [*722] material distinction in the discretionary powers of the prosecutor in offering to agree to a lesser sentence for a guilty plea or for a bench trial." *Corcoran v. State, 739 N.E.2d 649, 654 (Ind. 2000)* (emphasis added). Though as discussed, no plea is involved in the second offer. Nevertheless, the State [**32] Supreme Court saw no material distinction between the two offers. If it was the prosecutor's goal to dissuade the defendant from demanding a jury trial, he failed. The defendant demanded a jury trial and he got it. Furthermore, the defendant had the right to waive a jury trial, so what error is caused by receiving a benefit for choosing to exercise a lawful option? So too, the prosecutor had the authority to seek the death penalty or not, so what error is caused by conditionalizing his discretion?

When one pleads guilty, many rights are waived. Could the prosecutor have legitimately offered a different deal based on one of those other rights that are also relinquished as a part of a guilty plea? Could he have offered to waive the death penalty in exchange for waiving the *Fifth Amendment* right against self-incrimination merely to permit the prosecutor to comment on the defendant's failure to take the stand in his own defense? This would certainly simplify appeals involving whether the prosecutor strayed too far in closing argument. Could the death penalty be traded for the *Sixth Amendment* right to a public trial thereby permitting a secret adjudication? Alternatively, could the death [**33] penalty be swapped for the *Sixth Amendment* right to call witnesses in his defense? Further, could it be bartered for the *Sixth Amendment* right to confront and cross examine witnesses against him thereby barring the defendant and his counsel from observing the state's case in chief? This would transform the petit jury into more of a grand jury. What about conditioning the death penalty on surrendering the *Sixth Amendment* right to an impartial jury by

requiring the defendant to waive his right to participate in jury selection or to comment on the prosecutor's challenges during *voir dire*? Then again, a defendant has the right to fire his lawyer and proceed *pro se*, so could the death penalty be conditioned on relinquishing his *Sixth Amendment* right to counsel and proceeding at trial unrepresented?

The reason that these theoretical prosecutorial offers offend our sensibilities is not because the death penalty is used as a bargaining chip, after all it is clearly a bargaining chip when it is offered in exchange for a guilty plea Rather, the visceral reaction arises because what is traded in exchange is not a confession of the truth of the criminal allegations, but the very procedural [**34] safeguards we have enacted to protect the judicial process Such offers do more than attempt to abrogate a single individual's rights, they tinker with the rules that promote societal trust in our system of justice It is beyond doubt that prosecutors can negotiate for guilty pleas What they cannot do is strike a deal whose object is nothing more than a punishment for the exercise of a constitutional right

This is not a new legal principle In striking down the death penalty provisions of the Federal Kidnaping Act, the United States Supreme Court determined that the death penalty cannot be conditioned on a jury trial demand

> Under the Federal Kidnaping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed, the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the [*723] right to contest their guilt before a jury. The inevitable effect of any such provision is, [**35] of course, to discourage assertion of the *Fifth Amendment* right not to plead guilty and to deter exercise of the *Sixth Amendment* right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective. It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide
>
> The Government suggests that, because the Act thus operates to mitigate the severity of punishment, it is irrelevant that it may have the incidental effect of inducing defendants not to contest in full measure. We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights The question is not whether the [**36] chilling effect is "incidental" rather than intentional, the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear The Congress can of course mitigate the severity of capital punishment The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial

United States v Jackson, 390 U S 570, 581-82, 88 S Ct 1209, 20 L Ed 2d 138 (1968) (footnotes, quotation marks, and citations omitted; emphasis added) A decade later, the United States Supreme Court contrasted plea bargaining with merely punishing the exercise of a constitutional right

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional. But in the give-and-take of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject [**37] the prosecution's offer

Bordenkircher v Hayes, 434 U S 357, 363, 98 S Ct 663, 54 L Ed 2d 604 (1978) (citations and quotation marks omitted)

The Supreme Court of Indiana wrote that it did, "not see a material distinction in . offering to agree to a lesser sentence for a guilty plea or for a bench trial" *Corcoran v State, 739 N E 2d 649, 654 (Ind 2000)* That ruling was an unreasonable application of these clearly established United States Supreme Court precedents Twice the United States Supreme Court discussed and contrasted guilty pleas with negotiations which merely penalized the exercise of a constitutional right In both instances, the later was criticized In *Jackson*, the focus was on the penalty and the discussion of plea bargaining was used in contrast. In *Bordenkircher*, the focus was on plea bargaining and the discussion of penalties was used as a contrast Nevertheless, in both instances, the court was consistent in stating that a material distinction existed between agreeing to a lesser sentence in return for a guilty plea as opposed to doing so in [*724] return for a bench trial or any other procedural constitutional right

The Supreme Court of [**38] Indiana wrote that it considered an offer conditioned on a bench trial to be within "the discretionary powers of the prosecutor . " *Corcoran v State, 739 N E 2d 649, 654 (Ind 2000)* That ruling was objectively unreasonable Though *Jackson* specifically addressed an act of Congress, its legal principle was not so narrowly tailored Prosecutorial discretion is broad, but there is no basis for accepting that the executive branch can implement an *ad hoc* offer where the legislative branch is prohibited from accomplishing the same result after public deliberation. Furthermore, *Bordenkircher* explicitly stated that an agent of the state could not penalize a person's reliance on a constitutional right *Bordenkircher* was focused on plea bargaining and prosecutors were clearly the state agents being most prominently discussed

In addition to *Bordenkircher*, the Supreme Court of Indiana also cited *Hill v State, 499 N E 2d 1103, 1107 (Ind 1986)* and *Pauley v State, 668 N E 2d 1212, 1213 (Ind 1996)* in reaching its decision Nothing in this opinion should be read to question the accuracy or legitimacy of *Hill* and [**39] *Pauley* only their applicability to the facts of this case. Both *Hill* and *Pauley* involved a defendant who chose not to plead guilty, proceed with a jury trial, and was given a longer sentence than an accomplice Though the language of both cases said that the defendant exercised his right to a jury trial (which they did), the question in those cases was whether the defendants were penalized because they did not plead guilty Neither of those cases addressed the question of whether the trials were to a jury or to the bench. Thus both *Hill* and *Pauley* were about guilty pleas, not about waiving a jury and being tried by a judge Therefore neither of them are applicable to the fact pattern of this case

The only additional case the respondent discusses is *Corbitt v New Jersey, 439 U S 212, 99 S Ct 492, 58 L Ed 2d 466 (1978)*, but it is of no benefit to the respondent because as the United States Supreme Court stated

> There is no difference of constitutional significance between *Bordenkircher* and this case There, as here, the defendant went to trial on an indictment that included a count carrying a mandatory life term under the applicable state statutes There, as here, [**40] the defendant could have sought to counter the mandatory penalty by tendering a plea In *Bordenkircher*, as permitted by state law, the prosecutor was willing to forgo the habitual criminal count if there was a plea, in which event the mandatory sentence would have been avoided Here, the state law empowered the judge to impose a lesser term either in connection with a plea bargain or otherwise In both cases, the defendant gave up the possibility of leniency if he went to trial and was convicted on the count carrying the mandatory penalty In *Bordenkircher*, the probability or certainty of leniency in return for a plea did not invalidate the mandatory penalty imposed after a jury trial It should not do so here, where there was no assurance that a plea would be accepted if tendered and, if it had been, no assurance that a sentence less than life would be imposed. Those matters rested ultimately in the discretion of the judge, perhaps substantially influenced by the prosecutor and the plea-bargaining process permitted by New Jersey law.

Corbitt v New Jersey, 439 U S 212, 221-222, 99 S Ct 492, 58 L Ed 2d 466 (1978) (footnotes omitted) *Corbitt*, like *Hill* and *Pauley*, [**41] is about the juncture between [*725] pleading guilty or going to trial, not about whether to be tried by a judge or a jury *Corbitt* involved the legislative decision to codify the constitutionally permissible prosecutorial option of leniency in return for a guilty plea. That is to say, the United States Supreme Court, by analogizing *Corbitt* to *Bordenkircher*, agreed that the legislature can do through public deliberation what the executive can do through a plea bargain The distinction between the statutes in *Corbitt* and *Jackson* is that *Corbitt* avoided the bench trial vs jury trial conflict that caused the death penalty provisions of the statute in *Jackson* to be struck down

> The cases in this Court since *Jackson* have clearly established that not every

> burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid Specifically, there is no *per se* rule against encouraging guilty pleas We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea The plea may obtain for the defendant the possibility or certainty not only of a lesser [**42] penalty than the sentence that could be imposed after a trial and a verdict of guilty, but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury

Corbitt v New Jersey, 439 U S 212, 220, 99 S Ct 492, 58 L Ed 2d 466 (1978) (footnotes, quotation marks, ellipsis, brackets, and citations omitted). *Corbitt* does not permit conditionalizing the death penalty on waiving a jury trial and proceeding with a bench trial instead

Here, the petitioner was punished when he refused to waive his right to a jury trial and agree to allow a judge to determine his guilt The time sequence of such an offer and the filing of death penalty charges is not relevant That is to say, it does not matter whether the offer is to dismiss previously filed charges or to refrain from filing in the future The constitutional taint is the same Nevertheless, the sequence of events in this case is important The petitioner was charged with murder and negotiations ensued Though it is not clear when they began, nor how long they lasted, what is clear is that nine and a half months later they ended when, on the record, the prosecution withdrew from further discussions and announced [**43] the intent to seek the death penalty Trial Record at 151 The petitioner did not agree to be tried by a judge sitting without a jury and as a direct consequence, the prosecutor sought the death penalty. But for his demand for a jury trial, rather than a bench trial, he would not have faced the death penalty

Because the Supreme Court of Indiana did not see any material distinction between a guilty plea and the waiver of the right to a jury trial, it did not attempt to identify any other purpose or effect for the waiver of this procedural constitutional right. Neither has the respondent advanced any In this way, it as if neither fully grasp the difference between refusing to plead guilty and demanding a trial, as opposed to, refusing to consent to a bench trial and demanding a jury trial Without any possible explanation otherwise presented, the court can find no necessary reason to warrant the excessive effect of punishing the petitioner's assertion of his right to a jury trial rather than consenting to a bench trial *See Jackson at 582* Therefore it is the holding of this court that the prosecution unconstitutionally penalized the petitioner by seeking the death penalty when [**44] the petitioner refused to consent to the prosecution's offer to forgo the death penalty in exchange for the defendant's consent to waive a jury trial and proceed with a determination of guilt by the judge This offer by the prosecution was a violation [*726] of the petitioner's *Sixth Amendment* right to a jury trial

As a remedy for this constitutional violation, the petitioner seeks a new trial Traverse at 28 P 2, docket # 39. A new trial is not the appropriate relief Neither the prosecution's offer nor the charged death penalty denied the petitioner a fair trial The petitioner wanted a jury trial and he had a jury trial A jury found him guilty of these four homicides. Nothing about the offer or the charged death penalty impugned the fairness of his jury trial Therefore a new trial is neither necessary nor appropriate As discussed, the unconstitutional punishment was seeking the death penalty The correct remedy is to remove the punishment caused by the filing of death penalty charges, this only requires re-sentencing to other than a death sentence Such a remedy is consistent with the remedy provided in *Jackson* There the court struck down the death penalty provisions of the [**45] Federal Kidnaping Act, but left balance of the law So too, here the death sentence must be struck down and the case remanded for re-sentencing without the option of re-imposing the death sentence

V. GROUND 2 - SENTENCING ERRORS

GROUND 3 - UNCONSTITUTIONALITY OF THE INDIANA DEATH PENALTY STATUTE

GROUND 4 - PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE

GROUND 7 - INCOMPETENT TO BE EXECUTED

The remedy sought for the errors alleged in Grounds 2 and 3 is re-sentencing Traverse at 29, PP 3 and 4, docket # 39 In light of the court's conclusion that re-sentencing is required as a result of Ground 1, the court declines to further address Grounds 2 or 3

The remedy sought for Ground 4 is remand for a review of the merits of the alleged prosecutorial misconduct during the penalty phase. Traverse at 29, PP 5, docket # 39. Given this court's conclusion that re-sentencing is required as a result of Ground 1, any possible error during the penalty phase is rendered moot Therefore the court declines to further address Ground 4

In Ground 7, the petitioner argues that he is not competent to be executed Re-sentencing based on

Ground 1 to a sentence other than the death penalty [**46] renders this challenge moot Therefore the court declines to further address Ground 7.

VI GROUND 5 - INCOMPETENCY TO STAND TRIAL

The petitioner argues that he was incompetent during his state trial The respondent argues that this claim is procedurally defaulted In his traverse, the petitioner argues that claims of competency at trial cannot be waived and can be raised at any time This simply is not true.

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice

Coleman v Thompson, 501 U S 722, 750, 111 S Ct 2546, 115 L Ed 2d 640 (1991) (emphasis added) The petitioner does not argue that the state court rulings were not made pursuant to independent and adequate procedural rules Rather, the petitioner [*727] cites *Pate v Robinson, 383 U S 375, 86 S Ct 836, 15 L Ed 2d 815 (1966), Gosier v Welborn, 175 F 3d 504 (7th Cir 1999),* [**47] *Liegakos v Cooke, 106 F 3d 1381, 1385 (7th Cir 1997);* and *Matheney v Anderson, 60 F Supp 2d 846 (N D Ind 1999)* in support of his position

Pate does not speak to the question of procedural default nor whether trial competency can be challenged for the first time in a habeas proceeding But even if it did, the holding in *Coleman,* coming as it did 33 years after *Pate,* would still be controlling In *Pate,* the competency question had been raised and addressed by the state supreme court See *Pate v Robinson, 383 U S 375, 387 86 S Ct 836, 15 L Ed 2d 815 (1966)* (Harlan, J , dissenting) ("The facts now canvassed by this Court to support its constitutional holding were fully sifted by the Illinois Supreme Court") Therefore, *Pate* offers no assistance in deciding whether competency for trial can be raised for the first time in a habeas petition

The three lower court rulings cited by the petitioner are all more recent than *Coleman,* but they could not supercede it and are nevertheless inapplicable *Gosier* does squarely address the question of procedural default Its holding is based on confusion in Illinois law as to whether or not [**48] trial competency must be raised on direct appeal. "A defendant reading the state court's opinions would not think it necessary to raise this issue on direct appeal, and the forfeiture doctrine therefore does not bar collateral review in federal court." *Gosier v Welborn, 175 F 3d 504, 507 (7th Cir 1999)* Though it does not use the word "adequate", *Gosier* is based on a determination that the state court ruling was not based on an adequate state procedural rule because it had not been consistently applied. Furthermore, the petitioner here has not argued that Indiana does not have an adequate procedural rule or that any such confusion exists in Indiana law

Liegakos addressed a new interpretation of Wisconsin law by its supreme court which subsequently prevented collateral review of claims which could have been raised on direct appeal Wisconsin applied this ruling retroactively to cases on direct appeal before the new rule was announced The Seventh Circuit explicitly found that was, "not an 'adequate' state ground for appeals briefed before its announcement" *Liegakos v Cooke, 106 F 3d 1381, 1385 (7th Cir 1997)* The petitioner, citing [**49] *Liegakos,* also argues that, "AEDPA does not apply due to the procedural default ruling" Traverse at 16, n 5, docket # 39 It is true that *Liegakos* found that *28 U S C § 2254(d)* only applied to claims adjudicated on the merits in State court proceedings, but *§ 2254(d)* is not in question in regard to this ground. The procedural default question turns on whether these claims were exhausted as required by *28 U S C § 2254(b)(1)(A)*

Matheney contains dicta saying that competency for trial can be raised at any time, but that question was not at issue in *Matheney* because competency had been raised to the Indiana Supreme Court "Thus, it appears that Mathency properly raised the claims before the state court" *Matheney v Anderson, 60 F Supp 2d 846, 860 (N D Ind 1999).* On appeal, the Seventh Circuit also found that the issue had been raised and addressed by the Indiana Supreme Court *Matheney v Anderson, 253 F 3d 1025, 1038 n 15 (7th Cir 2001)* ("The Indiana Supreme Court held: (1) Matheney was competent to stand trial ")

Therefore, pursuant to *Coleman,* this ground is barred [**50] from habeas review unless he can demonstrate cause and prejudice or a fundamental miscarriage of justice The petitioner has made no effort to [*728] demonstrate either Though he repeatedly argues that he is mentally ill and not competent, these are not external factors demonstrating cause for procedural default

> We have never considered whether mental illness can constitute cause for default However, *Cawley v Detella, 71*

F.3d 691 (7th Cir. 1995), is instructive on this question. In *Crawley*, we held that the petitioner's depression did not constitute cause because it failed "to qualify as an external impediment." *Id. at 696*. We are also guided by other circuits that have considered the issue. In *Hull v. Freeman, 991 F.2d 86 (3d Cir. 1993)*, the Third Circuit determined that petitioner's borderline mental retardation did not establish cause because it was not "external" to his defense within the meaning of *Murray v. Carrier, [477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)]*. *[Hull,] 991 F.2d at 91*. The Ninth Circuit, in *Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988)*, held that petitioner's diagnosis [**51] as a "borderline mental defective" was insufficient to establish cause. *See also Cornman v. Armontrout, 959 F.2d 727, 729 (8th Cir. 1992)* (finding petitioner's below average intelligence insufficient to establish cause). Furthermore, it is well established in this Circuit that circumstances such as youth, lack of education, and illiteracy are not external impediments within the context of excusing procedural default. *See, e.g., Dellinger v. Bowen, 301 F.3d 758, 763 (7th Cir. 2002)* (petitioner's youth and lack of education did not constitute cause), *Henderson v. Cohn, 919 F.2d 1270, 1272-73 (7th Cir. 1990)* (petitioner's illiteracy and limited education insufficient to establish cause).

We find the reasoning in these cases persuasive. These cases highlight the emphasis placed on the "external" nature of the impediment. Something that comes from a source within the petitioner is unlikely to qualify as an external impediment. The examples given by the Court in *Murray* as to what constitutes an external impediment exemplify this point. Harris' low IQ and limited reading ability are not factors which are "external" to his defense.

[**52] *Harris v. McAdory, 334 F.3d 665, 670 (7th Cir. 2003)*.

Neither is there any basis for finding a fundamental miscarriage of justice.

> In order to show, alternatively, that a miscarriage of justice would result if habeas relief is foreclosed, the petitioner must show that he is actually innocent of the offense for which he was convicted, *i.e.*, that no reasonable juror would have found him guilty of the crime but for the error(s) he attributes to the state court. *Schlup v. Delo, 513 U.S. 298, 327-29, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*.

Lewis v. Sternes, 390 F.3d 1019, 1025-1026 (7th Cir. 2004) (parallel citations omitted). The petitioner here does not and has never argued that he is innocent of these four homicides.

Because the petitioner did not raise the question of his competency to stand trial in the state courts, and because he has not demonstrated either cause and prejudice nor the existence of a fundamental miscarriage of justice, this ground is procedurally defaulted.

VII. GROUND 6 - INCOMPETENCY TO WAIVE DIRECT APPEAL CLAIMS

In his traverse, the petitioner concedes that this claim is procedurally defaulted. "Respondent is correct, [**53] as the record currently stands, the claim is procedurally defaulted." Traverse at 21, docket # 39.

[*729] VIII. GROUND 8 - INCOMPETENCY TO WAIVE POST-CONVICTION RELIEF CLAIMS

The petitioner argues that "the state courts unreasonably found that Petitioner was competent and that he had knowingly, intelligently and voluntarily waived post-conviction review." Petition at 15, docket # 13. The respondent argues that the petitioner, "has no federal constitutional right to state collateral review . . . [but, regardless] the Indiana Supreme Court reasonably determined that Corcoran was competent to waive post-conviction proceeding by the standards set for by both *Dusky* and *Rees*." Return at 22-23, docket # 33. The petitioner replies that, "[i]n *St. Pierre v. Cowan, 217 F.3d 939 (7th Cir. 2000)*, the Seventh Circuit lifted procedural bars based on a state court's incorrect determination of a waiver of state post-conviction remedies." Traverse at 23, docket # 39.

St. Pierre is not applicable here. First, it is not based on current law. *See St. Pierre v. Cowan, 217 F.3d 939, 940 (7th Cir. 2000)* ("Applying the legal standards that obtained before [**54] the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214, we conclude that . . ."). In

this case, the four homicides occurred in 1997, after the passage of AEDPA Currently, the law requires that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U S C § 2254(d) (emphasis added) The Supreme Court of Indiana adjudicated the petitioner's claim that he was not competent to waive his post-conviction claims Therefore only United States Supreme Court cases can be used to determine the reasonableness of the state's determination Because [**55] *St Pierre* was decided by the Seventh Circuit, it is not relevant to this analysis

The Supreme Court of Indiana provided the following analysis of the petitioner's competency to waive post-conviction review of his conviction and sentence

> The State Public Defender attacks the trial court's competency determination on three grounds First, she argues that the trial court applied an improper standard to determine competency Second, she contends as a factual matter that Corcoran is incompetent to waive post-conviction review under any competency standard this Court might choose to employ Third, she maintains that as a result of Corcoran's incompetence, he could not knowingly, voluntarily, or intelligently waive his right to post-conviction relief
>
> A
>
> The State argues that the proper standard for determining the level of competency necessary for Corcoran to waive his right to post-conviction review was that set forth in *Dusky v United States, 362 U S 402, 80 S Ct 788, 4 L Ed 2d 824 (1960)* (per curiam) In *Dusky*, the Supreme Court held that a defendant is competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational [**56] understanding--and . . . [*730] has a rational as well as factual understanding of the proceedings against him." *362 U S at 402*. The State relies on this standard in part because it is consistent with *Indiana Code section 35-36-3-1*, Indiana's statutory trial competency standard
>
> The State Public Defender argues that the proper competency standard is that announced in *Rees v Peyton, 384 U S 312, 86 S Ct 1505, 16 L Ed 2d 583 (1966)* (per curiam). In *Rees*, the Supreme Court held that a capital defendant may withdraw a petition for certiorari only after it is determined whether "he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees, 384 U S at 314*
>
> We are constrained to say that we find little if any difference between the standards enunciated in *Dusky* and *Rees* *See Godinez v Moran, 509 U S 389, 398 n 9, 113 S Ct 2680, 125 L Ed 2d 321 (1993)* (acknowledging that the difference between the *Dusky* and *Rees* standards is [**57] not readily apparent and may only be one of terminology) A number of federal courts that have faced this question have been unable, or felt it unnecessary, to attempt to discern a difference between the two tests *See Deneys v Budge, 378 F 3d 880, 889 (9th Cir 2004)* (refusing to resolve whether there is any difference between the *Rees* and *Dusky* standards because the analytical outcomes under each test would be the same), *Michael v Horn, 2004 U S Dist LEXIS 3703 (M D Pa 2004)* (relying on both the principles of *Rees* and *Dusky* to determine competency to forego a collateral challenge), *Groseclose v Dutton, 594 F Supp 949, 957 n 4 (M D Tenn 1984)* (stating that *Dusky* is analytically equivalent to the *Rees* competency test)

Federal courts have been unwilling or unable to distinguish between the *Rees* and *Dusky* standards because both tests "highlight[] the constitutional necessity that a criminal defendant understand the proceedings and then be capable of aiding his legal counsel in choosing among legal alternatives." *Groseclose, 594 F Supp at 937 n 4* Under both standards, [**58] the inquiry focuses on the individual's "discrete capacity to understand and make rational decisions concerning the proceedings at issue " *Matu v Johnson, 210 F 3d 324, 329 n 2 (5th Cir 2000)* Further, neither test treats "the presence or absence of mental illness or brain disorder [as] dispositive" proof of incompetence, but balances its presence or absence with other evidence *Id* Both tests appear to be equivalent in that each is applied in the same way to determine whether an individual has the capacity to comprehend the legal proceedings with which he or she is confronted and assist his or her counsel in choosing among the various legal alternatives

For these reasons, we will evaluate the post-conviction court's competency determination under the principles of both standards

B

We have previously been required to review a post-conviction court's competency determination in a capital proceeding *Timberlake v State, 753 N E 2d 591, 597 (Ind 2001)* In *Timberlake*, we held that a post-conviction court's competency findings are afforded a high level of deference by a reviewing court The court's decision will be disturbed only [**59] "if [*731] the evidence is without conflict and leads only to a conclusion contrary to the result of the post[-]conviction court " *Id at 597*

The post-conviction court here acknowledged in its written findings that Corcoran suffers from a mental illness The State also concedes that Corcoran suffers from a mental illness At the competency hearing, the State Public Defender presented the testimony of three mental health experts, each of whom concluded that Corcoran suffers from paranoid schizophrenia One of the symptoms of Corcoran's condition, according to the three experts, are recurrent delusions that Department of Correction prison guards are torturing him through the use of an ultrasound machine, causing him substantial pain and uncontrollable twitching

On the basis of this diagnosis, all three experts concluded Corcoran was unable to make a rational decision concerning the legal proceedings confronting him Each expert stated that Corcoran's decision to forego post-conviction review of his sentence, thereby hastening his execution, was premised on his desire to be relieved of the pain that he believes he experiences as a result of his delusions To follow the [**60] experts' logic, Corcoran's decision to forego post-conviction review cannot be rational if based upon his delusions, which are irrational

Corcoran, however, made no statement to any of the experts evaluating him indicating that he wished to end his appeals in order to escape his paranoid delusions Corcoran's prison medical records and the testimony of each expert indicated that his psychotic symptoms were being controlled through various psychiatric medications. Corcoran himself spoke directly to his reasons for not pursuing post-conviction review and the contention that his delusions were prompting his actions at the post-conviction hearing stating:

> See, I want to waive my appeals because I am guilty of murder I think that I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever I am guilty of murder. I should be executed That is all there is to it That is what I believe I believe the death penalty is a just punishment for four counts of murder..and I believe that I should be executed since I am guilty of four counts of murder

(Super Ct Hr'g Tr at 89) Corcoran's explicit denial that his delusions prompted [**64] him to waive his right to post-conviction review and his reasoning that his death sentence is commensurate with the crime he committed (the conclusion to which both the original trial court jury and judge came), makes it impossible for this Court to conclude that "the evidence is without conflict and leads only to a conclusion contrary to the result of the post[-]conviction court." *Timberlake, 753 N.E.2d at 597*

Moreover, there is substantial evidence of record that Corcoran was aware of his legal position and the consequences of his decision to forego any further post-conviction review. When asked whether Corcoran has the capacity to understand his legal position, Dr. George Parker, who evaluated Corcoran in preparation for his post-conviction hearing stated

> He has a very clear awareness of the status of his case. He is aware he has been sentenced to death. He is aware that he is in the appeals process. He has a good memory of the events that have taken place from the time of the offense to the trial, to the sentencing phase, and then through the more extensive appeals phase [*732] He is aware of the attorneys' positions and how, how the attorneys have changed over [**62] the course of the trial and then [the] appeals process. So, he has a good understanding of what is at issue.

(Super. Ct. Hr'g. Tr. at 48) Dr. Robert Kaplan, who also evaluated Corcoran, testified that Corcoran was aware that by not continuing with post-conviction review that he would be executed.

Corcoran was questioned directly by both the State's attorney and the presiding judge regarding his awareness of the proceedings and his legal position. The State's attorney asked the following questions.

> Question: Do you understand that by waiving these appeals, you are going to make that happen (his execution) relatively soon?
>
> Corcoran: Yes, I understand.
>
> Question: Do you understand that this appellate process is the opportunity for you to fight to stay alive?
>
> Corcoran: Yes, I understand.
>
> Question: And you are willing to accept the sentence that was handed down by this Court?
>
> Corcoran: Correct.

(Super. Ct. Hr'g. Tr. at 13)

The post-conviction court then questioned Corcoran with respect to the entire history of his case. Corcoran stated that he was aware that he had been convicted of four capital crimes. He related that he understood the purpose of his initial [**63] direct appeal to the Indiana Supreme Court to review his death sentence and that his appeal had been unsuccessful. The judge then asked the following questions in order to ascertain Corcoran's level of awareness of the post-conviction proceedings taking place.

> The Court: [Do] you understand that these proceedings are your last attempt to review this case?
>
> Corcoran: Yes, I understand.
>
> The Court: Do you also understand that if the review here, were it necessary up on appeal, is unsuccessful, that you would be executed?

Corcoran Yes, I understand

The Court Has anyone, Mr Corcoran, forced you to waive your rights to appeal?

Corcoran No

The Court Has anyone threatened you to waive your rights to appeal?

Corcoran No

The Court. Did anybody tell you, anybody at all, tell you that you would get more favorable treatment if you waived your right to appeal?

Corcoran No.

The Court You understand that the two ladies sitting to your left are appointed by the Court to represent you?

Corcoran: Right, yes

The Court Do you trust their judgment?

Corcoran I disagree with them but I trust their judgment

The Court. What do you disagree with them about?

Corcoran: They [**64] didn't have to call a competency hearing, but they did anyway I disagree with calling the competency hearing.

The Court You disagreed with them filing that motion?

Corcoran Correct

The Court And you understand what their [defense attorneys'] responsibilities are?

Corcoran Yes.

The Court And what [the deputy attorney general's] responsibilities are?

Corcoran Yes

The Court And what my responsibilities are?

[*733] Corcoran Yes.

The Court. And you know what we are doing here today?

Corcoran Yes.

The Court. What were we doing here today?

Corcoran Determining my competency whether or not I am able to make a decision or not

(Super. Ct Hr'g Tr at 87-88) Both the State's and post-conviction judge's questioning of Corcoran reaffirm the testimony of Dr Parker that Corcoran was able to appreciate the gravity of his legal position and the consequences of his choice to waive further post-conviction review The portions of the record described and set forth supra are also sufficient evidence to support the post-conviction court's determination that Corcoran made his choice knowingly, voluntarily, and intelligently

Corcoran's awareness of his legal position and his [**65] ability to formulate a rational justification for forgoing further post-conviction review make him competent to waive such review under either *Rees* or *Dusky* The evidence supports the trial court's conclusion that Corcoran has both a rational understanding of and can appreciate his legal position Further, the evidence does not conclusively indicate that Corcoran's decision was not made in a rational manner Thus, we are unable to conclude that "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court," and so we affirm its competency finding *Tamberlake v*

State, 753 N.E.2d at 597 (citing Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999))

Corcoran v. State, 820 N.E.2d 655, 658-662 (Ind. 2005) (footnotes and parallel citations omitted, brackets in original)

The petitioner would have this court review and re-weigh the evidence presented during his state competency hearing. Though the court has reviewed this record, it cannot re-weigh the testimony because that is not permitted under *§ 2254(d)* or *(e)*. The Supreme Court of Indiana's determination is [**66] neither an unreasonable application of United State's Supreme Court law nor an unreasonable determination of the facts. The petitioner has not presented clear and convincing evidence to rebut the presumption of correctness given to the State Court's factual findings.

The petitioner argues that he does not meet the test set out in *Rees*, but he appears to ignore the word "substantially" as applied in the later prong of the test.

> [W]hether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Rees v. Peyton, 384 U.S. 312, 314, 86 S. Ct. 1505, 16 L. Ed. 2d 583 (1966) (emphasis added). The state courts acknowledged that the petitioner suffers from a mental illness and fully confronted this question. In the end they determined that his mental illness did not substantially affect his capacity to appreciate his position as a death row inmate and that he understood how and why he was there. Neither did his mental illness impact his understanding of his legal position [**67] *vis-a-vis* his appeals. Though philosophically one can question whether it can ever be a rational choice to abandon appeals which are the only means to avoid the death penalty, legally even *Rees* leaves no doubt that it is possible to do so. From a legal perspective, the state court's determination that the petitioner made a rational choice as not unreasonable.

The opinion of the Supreme Court of Indiana, as presented above, is thorough, [*734] thoughtful, and reasonable. Therefore no relief can be granted on this ground.

IX. CONCLUSION

For the foregoing reasons, the court now **GRANTS** the petition with respect to Ground 1. The court declines to address Grounds 2, 3, 4, and 7 because they are rendered moot by granting the petition on Ground 1. The court **DENIES** the petition as to Grounds 5 and 6 because they are procedurally defaulted. The court **DENIES** the petition as to Ground 8 because the Supreme Court of Indiana was not unreasonable in determining that Joseph Edward Corcoran was competent to waive post-conviction review of his conviction and sentence.

The Great Writ is now **GRANTED** on Ground 1 conditioned upon the State of Indiana resentencing Joseph [**68] Edward Corcoran to a sentence other than the death penalty within 120 days of this order.

IT IS SO ORDERED.

ENTERED: April 9, 2007

S/ ALLEN SHARP, JUDGE

UNITED STATES DISTRICT COURT

LexisNexis

LEXSEE 2008 U S APP LEXIS 26824

JOSEPH E. CORCORAN, Petitioner-Appellee, Cross-Appellant, v. EDWIN G. BUSS, SUPERINTENDENT, Respondent-Appellant, Cross-Appellee.

Nos. 07-2093 and 07-2182

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

551 F.3d 703; 2008 U.S. App. LEXIS 26824

December 3, 2007, Argued
December 31, 2008, Decided

PRIOR HISTORY: [**1]

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division. No. 05 C 389. Allen Sharp, Judge.

Corcoran v. Buss, 483 F. Supp. 2d 709, 2007 U.S. Dist. LEXIS 26768 (N.D. Ind., 2007)

COUNSEL: For JOSEPH E. CORCORAN, Petitioner - Appellee: Alan M. Freedman, Evanston, IL. USA. Laurence E. Komp, Manchester, MO.

For EDWIN G. BUSS, Superintendent, Respondent - Appellant: James B. Martin, OFFICE OF THE ATTORNEY GENERAL, Indianapolis, IN, USA.

JUDGES: Before BAUER, WILLIAMS and SYKES, Circuit Judges. WILLIAMS, Circuit Judge, concurring in part and dissenting in part.

OPINION BY: BAUER

OPINION

[*704] BAUER, *Circuit Judge*. On July 25, 1997, Joseph Corcoran shot and killed four men: his brother Jim Corcoran, his sister's fiance Robert Scott Turner, Timothy Bricker, and Doug Stillwell. An Indiana state court jury convicted Corcoran of four counts of murder. The trial court agreed with the jury's determination and sentenced Corcoran to death. Corcoran exhausted his state court direct appeals and waived state post-conviction review. In 2005, Corcoran filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana, claiming that his *Sixth Amendment* right to a jury trial was violated by an offer made by the State during pretrial negotiations, [**2] which in turn tainted his death sentence. The district court granted his petition. The State now appeals the district court's grant of habeas relief, Corcoran cross-appeals from the district court's decision that Corcoran was competent to waive his state post-conviction proceedings. For the following reasons, we affirm the district court's finding of competence, but we reverse the grant of habeas relief.

I. BACKGROUND

After Corcoran was indicted for four counts of murder under *Ind. Code § 35-42-1-1*, the State and Corcoran participated in extensive negotiations regarding the possibility of a plea agreement. The State made two offers: (1) a sentence of life without the possibility of parole in exchange for a plea of guilty, or (2) the dismissal of a request for the death penalty in exchange for Corcoran's agreement to proceed by bench trial instead of jury trial. Corcoran was advised by his counsel (during "several hundred" hours of meetings) that the offers were in his best interest for a number of reasons: (1) Corcoran had made a videotaped confession of the crimes, (2) his confession matched the physical evidence at the crime scene, (3) two of the three court-ordered psychiatrists that [**3] evaluated Corcoran concluded that he was competent to stand trial and to aid in his defense, and (4) defense counsel planned to present no defense at trial. Corcoran could not give a specific reason why he was unwilling to accept either offer, stating "I just feel like I should go to trial," and that he could not explain why. [*705] Negotiations lasted for approximately nine months, after which the State withdrew its offers and filed four applications for the death penalty.

1 At the request of defense counsel, an experienced Indiana Public Defender met with Cor-

coran to make sure he understood the offer made by the State to dismiss the death penalty in exchange for agreeing to a bench trial. She explained to Corcoran that she was "unaware of any other capital murder defendant to whom the prosecution had extended a pre-trial offer to dismiss the death penalty without requiring a guilty plea in exchange," and that "he would still have the opportunity to present evidence and [argue] for a sentence less than life without parole, without facing the risk of a greater sentence." The defense also arranged a meeting between Corcoran and a Public Defender in Marion County, who discussed the logic of [**4] why the offers were in Corcoran's best interest. Despite the lengthy discussions, Corcoran offered no specific reason for rejecting the offers, other than he had a "feeling" that he should go to trial.

Before trial, defense counsel gave notice to the court that an insanity defense would be asserted, after court-appointed doctors examined Corcoran and concluded that he was competent, defense counsel withdrew its claims. A jury found Corcoran guilty and recommended the death penalty. On August 26, 1999, the district court sentenced Corcoran to death.[2]

2 At the time of Corcoran's sentencing, Indiana law required the trial judge make an independent determination of whether to impose the death sentence. *Ind. Code § 35-50-2-9(e)*, *Lowery v. Anderson, 225 F.3d 853, 862 (7th Cir. 2000)*. The statute was amended in 2002, in light of *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*, to make the jury's decision final. See Act of Mar. 26, 2002, Pub. L. No. 117-2002, 2002-2 Ind. Acts 1734, *Ritchie v. State, 809 N.E.2d 258, 263 n.1 (Ind. 2004)*.

On direct appeal, Corcoran filed a written waiver of his right to appeal his convictions and challenged only his death sentence. Among the [**5] six claims that alleged the Indiana Death Penalty statute violated his state and federal constitutional rights, Corcoran argued that the statute violated his *Sixth Amendment* right to a jury trial in that when he declined the State's offer to proceed by a bench trial and chose to be tried by a jury, the State's request for the death penalty sought "to force [Corcoran] to abdicate a basic right," when the State actually believed that life imprisonment was the appropriate penalty. *Corcoran v. State, 739 N.E.2d 649, 654 (Ind. 2000)* (*Corcoran I*). The Indiana Supreme Court rejected all of Corcoran's arguments and upheld Indiana's Death Penalty statute as it applied to him. *Id.*

In addressing Corcoran's argument that his right to a jury trial was violated, the court emphasized that, under *Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d. 604 (1978)*, although constitutional limits do apply, the discretionary power of a prosecutor to offer plea bargains is wide. The court found that in the context of plea bargaining, there is no material distinction in these discretionary powers to agree to a lesser sentence in exchange for a guilty plea or for a bench trial. *Corcoran I, at 654* [**6] However, the court vacated Corcoran's sentence and remanded to the trial court, finding a "significant possibility that the trial court may have relied upon non-statutory aggravating factors in deciding whether to impose the death penalty" under Indiana law. *Id. at 657* (citing *Harrison v. State, 644 N.E.2d 1243 (Ind. 1995)*). On September 30, 2001, the trial court reweighed the statutory aggravators under *Ind. Code § 35-50-2-9(b)*[3] and reinstated [*706] Corcoran's death sentence, the Indiana Supreme Court affirmed his sentence on September 5, 2002. *See Corcoran v. State, 774 N.E.2d 495, 448-49 (Ind. 2002)* (*Corcoran II*).

3 The trial court relied upon the following aggravating circumstances: Corcoran was being tried in one proceeding for committing multiple murders, the murders were committed knowingly, intentionally, and in a particularly heinous way; and the mental disturbance suffered by Corcoran did not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The trial court also gave varying weight to mitigating circumstances, including the following: he was under the influence of a mental or emotional disturbance at the time [**7] of the murders, Corcoran's cooperation with authorities, his lack of criminal history, and his remorse.

Corcoran was required to file a petition for post-conviction relief in state court by September 9, 2003. In what would be the first in a series of flip-flops, he refused to sign his petition, believing that he should be put to death for his crimes. At the request of his counsel, a State Public Defender, the trial court scheduled a hearing in October, 2003, to determine whether Corcoran was competent to waive post-trial review of his conviction and sentence. Defense counsel sought the opinions of three mental health experts: clinical psychologist Dr. Robert G. Kaplan, forensic psychiatrist Dr. George Parker, and clinical neuro-psychologist Dr. Edmund Haskins. Each doctor separately interviewed Corcoran and reviewed his mental health records.

At the hearing, all three experts testified that Corcoran suffered from paranoid schizophrenia, the State and the post-conviction court acknowledged the same. According to the experts, symptoms of his disease included delusions that he had a speech disorder and a be-

lief that prison guards were operating an ultrasound machine to torment him. On the [**8] basis of that diagnosis, the experts concluded that Corcoran was unable to make a rational decision concerning his legal proceedings. Each expert stated that Corcoran's decision to waive post-conviction review of his sentence, thereby hastening his execution, was premised on his desire to be relieved of the pain that he believed he was experiencing as a result of his delusions. The experts also stated that Corcoran had the capacity to understand his legal position, and Dr. Parker testified that Corcoran had a clear awareness of the status of his case and what was at stake if he waived further proceedings.

Additionally, Corcoran testified at the competency hearing, where the prosecutor and the trial judge questioned him. He stated that he understood it was his last chance at a review of the case, and that if it was unsuccessful, he would be executed. He told the judge that he never wanted a competency hearing, and that he wanted to waive his appeals because he was guilty of murder. He stated:

> I think I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever. I am guilty of murder. I should be executed. That is all there is to it. That [**9] is what I believe. I believe the death penalty is a just punishment for four counts of murder.

In December, 2003, the post-conviction court found that Corcoran was competent to waive further challenges to his sentence and be executed. The court noted that:

> [the] evidence is clear that [Corcoran] suffers from a mental illness. . . . [however the issue before the court was] whether he is competent to waive post-conviction review. . . . [t]he dialogue the State and the Court had with [Corcoran] clearly indicate he is competent and understands what he is doing. While his choice of action may be unwise, and obviously against the advice of counsel, he is competent to make this ultimate decision in spite of his mental illness.

The Indiana Supreme Court affirmed the post-conviction court's competency determination. *See Corcoran v. State, 820 N.E.2d 655, 662, [*707] aff'd on reh'g, 827 N.E.2d 542 (Ind. 2005) (Corcoran III)*. In doing so, the court considered: (1) the testimony of the experts, each of whom concluded that his decision to forego post-conviction review was premised on his desire to be relieved of the delusional pain he was experiencing as a result of his mental illness, (2) the fact that Corcoran [**10] did not tell any expert that he wished to end his appeals in order to escape his delusions, (3) his prison records and expert medical testimony which revealed that his psychotic symptoms were being controlled through various psychiatric medications; (4) Corcoran's statements at the hearing that he wanted to waive his appeals; and (5) evidence that Corcoran was aware of his legal position and the consequences of his decision, such as his own testimony at the hearing as well as expert testimony that he was cognizant of his sentence and the appeals process. The court concluded that the evidence supported the trial court's determination that Corcoran had "both a rational understanding of and can appreciate his legal position . . . [and] the evidence does not conclusively indicate that Corcoran's decision was not made in a rational manner." *Id. at 662.*

On February 10, 2005, Corcoran changed his mind and attempted to file a verified state post-conviction petition, which was dismissed as untimely by the trial court. The Indiana Supreme Court affirmed the trial court on April 18, 2006, stating that "[w]e have afforded Corcoran considerable review of his sentence . . . and the post-conviction [**11] court's competency determination. The public interest in achieving finality at this stage weighs heavily against further review." *Corcoran v. State, 845 N.E.2d 1019, 1023 (Ind. 2006) (Corcoran IV)* (internal citations omitted).

On November 8, 2005, Corcoran filed an untimely petition for a writ of habeas corpus with the United States District Court for the Northern District of Indiana, raising eight claims that his constitutional rights had been violated by the proceedings that resulted in his conviction and death sentence. On December 5, 2005, Corcoran again changed his mind and filed a pro se "Petition to Halt All Future Appeals," in which he indicated that he did not wish to further challenge his convictions and sentence. On March 31, 2006, Corcoran sent a letter to the district court, stating that he only signed the post-conviction petition (filed on February 10, 2005) because he believed the Indiana Supreme Court would find him competent. He further stated that he never intended to appeal his sentence, and that he had consented to the filing of the habeas petition in acquiescence to the requests of his wife and his attorneys. He also told the court that he fabricated the story about [**12] being tortured by an ultrasound machine in prison, and he denied that his sleep disorder was a motivation to give up on appeal. Corcoran asked the district court to accept the

Indiana Supreme Court's finding that he was competent, and in essence, deny his habeas petition

Against Corcoran's wishes, on April 9, 2007, the district court granted Corcoran's petition for habeas relief under *28 U S C § 2254(d)*, finding the Indiana Supreme Court's holding in *Corcoran I* that the offer was within "the discretionary powers of the prosecutor" violated Corcoran's right to a jury trial under *United States v Jackson, 390 U S 570, 88 S Ct 1209, 20 L Ed 2d 138 (1968)*, which held that a provision of the Federal Kidnapping Act, *18 U S C §§ 1201* and *1202*, that reserved the possibility of the death penalty exclusively for defendants who insisted on a jury trial, imposed an impermissible burden on the right to a jury trial The district court considered both of the State's offers in adjudicating the present [*708] petition, and found that while the first offer to waive the death penalty in exchange for a guilty plea was well within prosecutorial discretion, the second offer sought to coerce Corcoran into [**13] waiving his right to a jury trial, and as such, was "objectively unreasonable" under the United States Supreme Court's decision in *Jackson Corcoran v Buss, 483 F Supp 2d 709, 723-24 (N D Ind 2007) (Corcoran V)* The district court distinguished *Bordenkircher* from the instant case, by finding that the State's second offer could not be considered in the context of plea negotiations, for the offer did not seek an admission of guilt. The district court also found that the Indiana Supreme Court, in *Corcoran III*, reasonably concluded that Corcoran was competent to waive his state post-conviction remedies The court granted Corcoran's petition and ordered the State of Indiana to re-sentence Corcoran to a sentence other than death within 120 days *Corcoran V, at 734*. The State appealed the grant of the habeas petition to this Court, Corcoran filed a cross-appeal, challenging the district court's conclusion that he was competent to waive his right to post-conviction review

II. ANALYSIS

Federal courts are authorized to grant a writ of habeas corpus when an individual is held in custody under a state court decision in violation of the United States Constitution. "We review the district court's [**14] findings of fact for clear error and its legal conclusions, as well as mixed questions of law and fact, *de novo*." *Rizzo v Smith, 528 F 3d 501, 503 (7th Cir 2008)* In doing so, we, like the district court, must evaluate the decision of the last state court to have adjudicated Corcoran's claim on the merits according to the standards set forth in *28 U S C § 2254(d)*. *Williams v Bartow, 481 F 3d 492, 497-98 (7th Cir 2007)* We will not grant a writ of habeas corpus unless the state court decision (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States", or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *§ 2254(d)*, *Johnson v Loftus, 518 F 3d 453, 456 (7th Cir 2008)* (citing *Williams v Taylor, 529 U S 362, 376, 120 S Ct 1495, 146 L Ed 2d 389 (2000)*)

In determining whether the district court was correct in granting Corcoran's habeas petition, we must first identify the "clearly established Federal law" that Corcoran argues was offended by the Indiana state court decision *Searcy v Jaimet, 332 F 3d 1081, 1087 (7th Cir 2003)*. [**15] We then determine "whether the state court's decision was either 'contrary to' or 'involved an unreasonable application of those legal principles'" *Id at 1088*. A decision is "contrary to" federal law when the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts *Williams, 529 U S at 405-06, 120 S Ct 1495* (quotations omitted), *Calloway v Montgomery, 512 F 3d 940, 943 (7th Cir 2008)* An "unreasonable application" of clearly established federal law in the habeas context is more than an "incorrect" application *Woods v McBride, 430 F 3d 813, 817 (7th Cir 2005)* ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.") (citing *Williams, 529 U S at 411, 120 S Ct 1495*). "Rather, in order [*709] to trigger grant of the writ, the state court decision must be both incorrect and unreasonable." *Id at 817*; *see also Johnson, 518 F 3d at 456* (noting that the Supreme [**16] Court has "recently reemphasized that a state court's application of clearly established law is acceptable, even if it is likely incorrect, so long as it is reasonable") (citing *Wright v Van Patten, U S , 128 S Ct 743, 169 L Ed 2d 583 (2008)*) In assessing the reasonableness of the Indiana Supreme Court's decision, we presume that its factual determinations are correct, unless clear and convincing evidence to the contrary rebuts them *28 U S C § 2254(e)(1)*, *Mack v McCann, 530 F 3d 523, 533 (7th Cir 2008)*

A. Right to Jury Trial

We begin with Corcoran's contention that the State sought to "unconstitutionally chill or squelch the assertion of his right to a jury trial by penalizing Corcoran with a death sentence for exercising that right," which was contrary to or an unreasonable application of the "bright-line" rule in *Jackson*

In *Jackson*, the Supreme Court construed a provision of the Federal Kidnapping Act, *18 § 1201(a)*, to allow for the imposition of the death penalty only upon the

recommendation of a jury after a guilty verdict, whereas the maximum penalty for a defendant who pled guilty or waived a jury and was tried in a bench trial, was life imprisonment. The Court struck [**17] down the provision, finding that it reserved the possibility of the death penalty exclusively for defendants who insisted on a jury trial and therefore imposed an impermissible burden on their right to a jury trial because it "chill[s] the assertion of constitutional rights by penalizing those who choose to exercise them." *Jackson, 390 U.S. at 581, 88 S.Ct. 1209*. The Court reasoned that the inevitable effect of the provision would be to discourage the assertion of the *Fifth Amendment* right not to plead guilty and to deter the exercise of the *Sixth Amendment* right to a jury trial. "[T]he evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them." *Id. at 583, 88 S.Ct. 1209*.

In the wake of *Jackson*, the Supreme Court has consistently held that *Jackson* does not stand for the proposition "that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *See e.g., Chaffin v. Stynchcombe, 412 U.S. 17, 29, 93 S.Ct. 1977, 36 L.Ed.2d. 714 (1973)* (discussing cases). In *Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d. 747 (1970)*, [**18] a petitioner pleaded guilty and was sentenced to 50 years' imprisonment after being indicted under the Federal Kidnapping Act (the same statute at issue in *Jackson*). The petitioner argued that his guilty plea was involuntary, and therefore invalid under *Jackson*, since, according to the petitioner, every guilty plea entered under the Act before *Jackson* was invalidated by *Jackson*. The Court concluded that the petitioner "read far too much into the *Jackson* opinion. *Jackson* prohibits the imposition of the death penalty under *§ 1201(a)*, but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test . . . that guilty pleas are valid if both 'voluntary' and 'intelligent.'" *Brady, 397 U.S. at 746-47, 90 S.Ct. 1463; see also North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d. 162 (1970)* ("*Jackson* established no new test for determining the validity of guilty pleas.").

[*710] The Supreme Court continued to reaffirm "the permissibility of plea bargaining even though 'every such circumstance has a discouraging effect on the defendant's assertion of his trial right,' because the imposition of these difficult choices [**19] [is the] inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Corbitt v. New Jersey, 439 U.S. 212, 219 n. 9, 99 S.Ct. 492, 58 L.Ed.2d. 466 (1978)* (quoting *Chaffin, 412 U.S. at 31, 93 S.Ct. 1977*). In *Bordenkircher v. Hayes*, the prosecutor offered to forego a habitual criminal count if the defendant pleaded guilty, in which event the mandatory life sentence would have been avoided. The defendant refused the offer, went to trial on an indictment that included a count requiring mandatory life imprisonment, and a jury found him guilty. The Court upheld the conviction, holding that the State's offer did not violate due process because it had "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution," and emphasizing that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, [and] for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional'." *Id. at 363, 368, 98 S.Ct. 663*. [**20] But "in the give-and-take of plea bargaining, there is no such element of punishment or retaliation as long as the accused is free to accept or reject the prosecution's offer." *Id. at 363, 365, 98 S.Ct. 663* (internal citations omitted).

"[B]y tolerating and encouraging the negotiation of pleas, [the Supreme] Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Id. at 364, 98 S.Ct. 663*. Under *Bordenkircher* and its progeny, "the Supreme Court has applied a presumption of vindictiveness 'exclusively in the *post-trial* context,' and has specifically considered and rejected claims that a presumption is applicable when, following failed [*pre-trial*] plea negotiations, additional charges are brought against a defendant." *Williams, 481 F.3d at 504* (analyzing *Bordenkircher*) (emphasis added) (internal citation omitted), *see also United States v. Wardo, 285 F.3d 573, 580 (7th Cir. 2002)* ("The classic instance triggering the presumption [of vindictiveness] is the one in which the same judge tries and sentences a person for a second time after he [**21] has succeeded in having his original conviction reversed."). [4]

4 Corcoran does not argue that the State was vindictive in its decision to seek the death penalty.

Corcoran's attempt to equate the offer to waive his right to jury trial *during pre-trial negotiations* to a defendant who chose to exercise a legal right (*in a post-trial setting*) to attack his original conviction is an unreasonable interpretation of *Bordenkircher*, and the district court erred in accepting it.

Consequently, we have found no authority from the Supreme Court that provides support for the district court's decision that *Jackson* clearly established a rule that stands for the proposition that during pre-trial negotiations, a prosecutor cannot offer to forgo the death pen-

alty in exchange for a bench trial." The Court has squarely [*711] held that a State may encourage a guilty plea by offering substantial benefits in return for the plea, including an offer to forego seeking the death penalty. *See Corbitt, 439 U.S. at 218, 99 S.Ct. 492.* By making the second offer, the prosecutor merely tried to induce Corcoran to give up a right by agreeing to lenient treatment for Corcoran. Because it is clearly established law that a prosecutor [**22] may offer a "recommendation of a lenient sentence or a reduction of charges" as part of the plea bargaining process, we believe the Indiana Supreme Court correctly analyzed Corcoran's claim in the context of plea-bargaining under *Bordenkircher*

> 5 We also note that the condemned provision of the Federal Kidnapping Act in *Jackson* provided in effect that a defendant could not be sentenced to death if he pled guilty, but faced a significant likelihood of capital punishment if he went to trial. However, the Indiana Death Penalty statute, which applies to Corcoran's state law murder convictions, permits a defendant to be sentenced to death, whether he pleads guilty, proceeds by bench trial, or proceeds by jury trial. *See Ind. Code § 35-50-2-9(a)-(d), Smith v. State, 686 N.E.2d 1264, 1271 (Ind. 1997).*

As for the district court's conclusions that the State's second offer could not be considered a plea bargain since Corcoran was asked not for an admission of guilt, but rather to waive his right to a jury trial, these contentions have no basis for support in *Jackson* or elsewhere. First, the Supreme Court has upheld pleas that do not include an admission of guilt, commonly referred to as "*Alford* [**23] pleas." *See generally Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.* Further, while we believe that the State's second offer to forego the death penalty if Corcoran tried his case to the bench may be uncommon, the Supreme Court has long instructed that plea agreements may waive constitutional or statutory rights, most permanently the right to a jury trial. *Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); see New York v. Hill, 528 U.S. 110, 117, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000)* ("We allow waiver of numerous constitutional protections for criminal defendants that also serve broader social interests."); *Godinez v. Moran, 509 U.S. 389, 397 n.7, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993)* ("A criminal defendant waives three constitutional rights when he pleads guilty: the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers.") (citing *Boykin, 395 U.S. at 243, 89 S.Ct. 1709*). A criminal defendant may waive these fundamental protections afforded by the Constitution, so long as that waiver is made "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." *Ruiz v. United States, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002)* [**24] (citing *Brady, 397 U.S. at 748, 90 S.Ct. 1463*), *Corbitt, 439 U.S. at 218-19, n.9, 99 S.Ct. 492* (footnote omitted) (emphasizing that "*Jackson* had in no way altered the test of *Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)* that guilty pleas are valid if knowing, voluntary, and intelligent.") A defendant may waive many other fundamental protections along with the right to a jury trial, in the context of plea negotiations, such as the right to view impeachment information relating to any informants or other witnesses, *see Ruiz, 536 U.S. at 629, 122 S.Ct. 2450*, and *United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)*, the right to an indictment, a trial, and an appeal (also known as a "fast-track" plea bargain), *see Ruiz, 536 U.S. at 629, 122 S.Ct. 2450*, the right to prevent the admission of statements during plea negotiations under *Federal Rule of Evidence 410* and *Federal Rule of Criminal Procedure 11(e)(6), see* [*712] *United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995)*; the right to collaterally attack a sentence, *see United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)*; the right to a double [**25] jeopardy defense, *Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987)*, the right to counsel, *Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)*, and the right to appeal, *see United States v. Hare, 269 F.3d 859, 861 (7th Cir. 2001).*

During the pre-trial negotiations, the State *and* Corcoran's counsel attempted to convince Corcoran to plead guilty, or in the very least, proceed by bench trial, due to the overwhelming evidence against him. If it is constitutionally permissible to use the threat of more severe punishment to encourage a guilty plea, where a defendant gives up most of his rights, it should follow that the State's use of the same tactics to encourage a defendant to proceed by bench trial would also be constitutionally permissible, where he would have an opportunity to present evidence and cross-examine witnesses--rights that would not otherwise be able to assert had Corcoran pleaded guilty. At the very least, *Jackson* does not render an offer like this impermissible or unconstitutional. Obviously, a jury trial is more burdensome than a bench trial for the State. But even in a bench trial, the State must present its full case against the [**26] defendant, and in turn, the defendant is entitled to offer a full defense. *United States v. Goodwin, 457 U.S. 368, 383, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)* ("A prosecutor has no 'personal stake' in a bench trial and thus no reason to engage in 'self-vindication' upon a defendant's request for a jury trial.").

"Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of making an intelligent choice in" accepting or

rejecting the offer *Bordenkircher, 434 U S at 363, 98 S Ct 663* (citing *Brady, 397 U S at 758, 90 S Ct 1463*) Indeed, counsel for Corcoran spent several hundred hours discussing his plea options, and acknowledged the overwhelming evidence against Corcoran and the generous nature of the State's offers in light of the evidence Defense counsel even brought in other attorneys to speak with Corcoran to discuss the offers, and how, even though the offer to forego death in exchange for a bench trial had "never been heard of," it still gave Corcoran the option of presenting arguments and evidence to the court. A party in a criminal proceeding who does not like the terms of an offered plea bargain can refuse to accept them [**27] it "by spurning the offer and going to trial " *Hare, 269 F 3d at 862* Corcoran took this route, which involved risking a death sentence should he lose at trial

Given the amount of evidence complied against Corcoran that he was responsible for the murders, including his own videotaped confession and the lack of defense that his counsel had available at trial, the State did not needlessly punish (under *Jackson*) Corcoran's right to a jury trial by making an offer to forego asking for death if he chose a bench trial "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of societal interest in prosecution." *Goodwin, 457 U S. at 382, 102 S Ct 2485* The Indiana Supreme Court's conclusion that the State's offer did not violate Corcoran's constitutional rights does not "[ie] well outside the boundaries of permissible differences of opinion " *See Ward v Sternes, 334 F 3d 696, 703 (7th Cir 2003)* The decision was neither incorrect nor unreasonable to warrant the district court's grant of Corcoran habeas petition

[*713] **B. Competency to Waive Post-Conviction Review**

Corcoran cross appeals the district court's holding that Corcoran was [**28] competent to waive his post-conviction proceedings Corcoran argues that the Indiana Supreme Court's conclusion that Corcoran was competent to waive post-conviction review was unreasonable and made despite clear evidence to the contrary As we noted above, a federal court may set aside a state court's "decision that was based on an unreasonable determination of the facts in light of the evidence presented," and a federal court may not overturn a state court's factual determinations unless it concludes that they are not "fairly supported by the record " *§ 2254(d)(2), (e), Demosthenes v Baal, 495 U S 731, 735, 110 S Ct 2223, 109 L Ed 2d 762 (1990)* (per curiam) The Supreme Court has held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption. *Demosthenes, 495 U S at 735, 110 S Ct 2223.*

The petitioner has a "tougher row to hoe" when challenging his competence in postconviction proceedings than when he is challenging his competence to stand trial *Holmes v Buss, 506 F 3d 576, 579 (7th Cir 2007)* Under *Rees v Peyton, 384 U S 312, 86 S Ct 1505, 16 L Ed 2d 583 (1966)*, when determining a petitioner's mental competence to forego judicial [**29] proceedings, a court must ask "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation," or "whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises " *384 U S at 314, 86 S Ct 1505; Wilson v Lane, 870 F 2d 1250, 1254 (7th Cir 1989), see also Holmes v. Buss, 506 F 3d 576, 579 (7th Cir 2007)* ("If the question is whether a petitioner for habeas corpus who has been sentenced to death is competent to withdraw a petition for certiorari filed on his behalf challenging the denial of habeas corpus, the answer is unlikely to require that he understand more than that the withdrawal of his petition will almost certainly terminate any legal challenge to his death sentence.") (internal citations omitted)

Corcoran believes the record clearly established that his decision to waive his rights was not based on "rational thinking" as discussed in Rees. He argues that three medical experts testified that he suffered from a mental illness and that his decision to waive any further appeal of his sentence was the product of the delusions [**30] and pain he was experiencing as a result of his illness Corcoran also contends that the Indiana Supreme Court erred in finding that he was aware of his legal position and the consequences of his waiver

The Indiana Supreme Court gave careful consideration of all the evidence presented at the post-conviction hearing The court acknowledged that the experts testified that Corcoran suffered from paranoid schizophrenia and his resulting delusions caused him to waive further review of his sentence, but the court also found that Corcoran had a clear awareness of the status of his case and what was at risk if he waived further review The court took into account Corcoran's own conduct and testimony at the hearing, in which he stated that his decision to waive further proceedings was based on his remorse for his crime, and not on any "delusions" he was said to have been experiencing Although the experts believed otherwise, the Indiana Supreme Court was entitled to accept Corcoran's contention that his request to waive further proceedings was based on his belief that death is a just punishment for his crimes *See United States v Collins, 949 F 2d 921, 926 (7th Cir 1991)* (finding [*714] that statements [**31] of the defendant are appropriate evidence for the court to consider when evaluating competency) The Indiana Supreme Court has recognized that

"[w]hile most people consider death the ultimate penalty, some murderers faced with life imprisonment may rationally disagree." *Smith v State, 686 N E 2d 1264, 1273 (Ind 1997)* (considering a defendant's preference for death over life imprisonment, where there was an indication of his desire not to spend the rest of his life in prison and noting that to do so is not "per se irrational"); *see also Wilson v Lane, 870 F 2d 1250, 1254 (7th Cir. 1989)* (in affirming a district court's finding of a death row inmate's competency to waive further appeals even though the inmate was ruled mentally incompetent, the Court considered the inmate's unwavering testimony that he was aware of his position and of the federal review options available to him, and that he based his decision not on the conditions of his confinement, but on his belief that death was a better option than life in prison).

Further, under the *Rees* standard, there is no support for Corcoran's contention that a petitioner who has been diagnosed with a mental illness is not competent to waive [**32] post-trial proceedings. The question under *Rees* is whether a mental illness substantially affects the capacity to appreciate his options and make a rational choice among them. *See Whitmore v Arkansas, 495 U S 149, 166, 110 S Ct 1717, 109 L Ed 2d 135 (1990)* (citing *Rees, 384 U S at 314, 86 S Ct 1505*), *see also Dennis v Budge, 378 F 3d 880, 889-92 (9th Cir 2004)* (rejecting the claim that under *Rees*, a prisoner on death row should not be allowed to waive his post-conviction remedies if there is any possibility that the decision is a product of a mental disease, disorder or defect), *Smith v Armontrout, 812 F 2d 1050, 1057 (8th Cir 1987)* ("It is very probable that in every case where a death-row inmate elects to abandon further legal proceedings, there will be a possibility that the decision is the product of a mental disease, disorder, or defect . . . [y]et Rees clearly contemplates that competent waivers are possible.")

Our review of the transcripts and the evidence before the Indiana Supreme Court reveals that it (as well as the two other courts that considered Corcoran's competency) thoroughly and conscientiously examined Corcoran's claims of incompetency, and its findings [**33] that he had a "rational understanding of and [could] appreciate his legal position" are factually supported by the record. Therefore, because the Indiana Supreme Court's decision was based on a reasonable determination of the facts in light of the evidence, we defer to the determination of the Indiana Supreme Court that Corcoran was competent.

III. CONCLUSION

The district court's finding that Corcoran was competent to waive his post-conviction proceedings is AFFIRMED. However, the decision of the district court to grant Joseph Corcoran habeas relief is REVERSED and REMANDED with instructions to deny the writ, and the State of Indiana is at liberty to reinstate the death penalty.

CONCUR BY: WILLIAMS (In Part)

DISSENT BY: WILLIAMS (In Part)

DISSENT

WILLIAMS, *Circuit Judge*, concurring in part and dissenting in part. I agree with the majority regarding Corcoran's *Sixth Amendment* claim, and I join that part of the opinion. However, I disagree with my colleagues' conclusion that Corcoran was competent to waive post-conviction review.

No one contests that Corcoran suffers from a mental illness. This is clear from his delusion that prison guards torture him daily [*715] with an ultrasound machine, his conversations with individuals who [**34] are not there, and his delusion that he suffers from an involuntary speech disorder. The question now is whether the Indiana state court was reasonable in finding that despite his illness, Corcoran was able to make a rational choice with respect to waiving any further appeal of his death sentence. *See Ward v Sternes, 334 F 3d 696, 703 (7th Cir 2003)*. The Indiana Supreme Court determined he was able to make a rational choice--one not driven by a desire to escape his delusions--based on three reasons. Because two of those reasons are directly contradicted by the record, however, I believe the Indiana court's decision finding waiver under these circumstances was unreasonable error.

Under *28 U S C § 2254(d)*, the court can grant a writ of habeas corpus only where state court adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court", or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See also Williams v Taylor, 529 U S 362, 376, 120 S Ct 1495, 146 L Ed 2d 389 (2000)*. Corcoran must offer clear and convincing evidence to [**35] rebut the presumption that the Indiana Supreme Court's competency finding was correct. *§ 2254(e)(1)*.

The Indiana Supreme Court correctly identified *Rees* as the governing standard. *Rees v Peyton, 384 U.S. 312, 314, 86 S. Ct. 1505, 16 L. Ed. 2d 583 (1966)* (per curiam). In *Rees*, the Supreme Court articulated the following legal standard to be applied when a death row inmate seeks to forego further proceedings: "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering

from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* Although the Indiana Supreme Court used the correct standard, it made an unreasonable determination of the facts in light of the evidence presented.

The three experts who testified in the competency hearing unanimously concluded that Corcoran suffers from paranoid schizophrenia that renders waiver of further appeal of his death sentence impossible because the illness prevents him from making rational decisions. *Corcoran v. State, 820 N.E.2d 655, 660, aff'd on reh'g, 827 N.E.2d 542 (Ind. 2005)* (*Corcoran III*). All three experts [**36] interviewed Corcoran for several hours, reviewed his medical and prison records, his presentencing memorandum, numerous prior mental health evaluations, and correspondence between Corcoran and his sister. Additionally, one of the experts conducted interactive and written tests. They all agreed that Corcoran was not capable of making a rational waiver decision because he suffered from paranoid delusions and those served as the basis of his decision to waive post-conviction relief. The doctors explained that Corcoran suffered from the delusion that prison guards tortured him with sound waves causing his body to twitch and the delusion that he suffered from an involuntary speech disorder. *See* Competency Hr'g Tr. 12, Oct. 21, 2003.

Despite this evidence, the Indiana court concluded that Corcoran had the capacity to make a rational choice on the following grounds:

> Corcoran . . . made no statement to any of the experts evaluating him indicating that he wished to end his appeals in order to escape his paranoid delusions. Corcoran's prison medical records and the testimony of each expert indicated that his psychotic symptoms were being [*716] controlled through various psychiatric medications. Corcoran [**37] himself spoke directly to his reasons for not pursuing post-conviction review and the contention that his delusions were prompting his actions at the post-conviction hearing.

Corcoran III, 820 N.E.2d at 660 (footnote omitted).

The problem with the conclusion that Corcoran had the capacity to make a rational choice is that two of the court's three reasons are directly contradicted by the evidence presented. *See Mendiola v. Schomig, 224 F.3d 589, 592 (7th Cir. 2000)* ("If a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254.") First, the court reasoned Corcoran never told any of the experts that he wanted to die to escape his delusions. That is not true. Second, the court stated that each expert indicated Corcoran's medication controlled his psychotic symptoms. That also is not true. The court also relied on Corcoran's own testimony, but the court failed to consider Corcoran's testimony in light of his delusions.

The court's first reason for finding Corcoran capable of making a rational choice was that Corcoran never told any expert that he wanted to die to escape his delusions. This statement was wrong, however, [**38] because Corcoran did tell Dr. Kaplan that he wanted to die in order to escape the delusions, some of which he said caused him pain.[1] Dr. Kaplan explicitly testified that during his meeting with Corcoran, Corcoran told him he wanted to be put to death because "he wanted to be released from the quote, unquote, pain and suffering of his involuntary speech disorder which really doesn't exist." Competency Hr'g Tr. 19. The experts all agree that Corcoran does not suffer from a speech disorder, but that his delusion causes him to believe he does. *Id.* at 62.

> [1] I also note that Dr. Haskins testified that Corcoran wanted to bring about his own death "[i]n order to escape from his supposed persecution and the control of the guards and his discomfort over this delusion about speaking involuntarily." Competency Hr'g Tr. 68. It is not clear from Dr. Haskins's testimony whether he learned of these reasons only through Corcoran's correspondence or through his interview with Corcoran or a combination of both. But even with Dr. Haskins's testimony aside, Corcoran clearly told Dr. Kaplan he wished to die to escape his involuntary speech disorder.

Second, the record directly contradicts the court's [**39] finding that each expert indicated that Corcoran's medication controlled his psychotic symptoms. Dr. Kaplan explicitly testified that Corcoran's medication did not have a significant effect on controlling his paranoia and delusions. *Id.* at 34. Moreover, Dr. Kaplan was the only one of the three experts who was asked to testify about the effects of Corcoran's medication. When he did, Dr. Kaplan acknowledged that Corcoran benefitted from taking his antipsychotic medications, but stated that even when medicated "it didn't appear that at any time he was not paranoid or not delusional." *Id.* at 34. Dr. Kaplan further testified that medical records revealed that even after Corcoran took a "very high dose" of an antipsychotic medication in prison he continued to suffer from paranoia and auditory hallucinations. *Id.* at 24. I also note that the postconviction trial court had made the same incorrect finding that testimony at the hearing showed that Corcoran's medication controlled his symptoms. This is significant because the Indiana Supreme

Court gave a high level of deference to the trial court's conclusion *Corcoran III, 820 N E 2d at 660*

The Indiana Supreme Court unreasonably concluded that [**40] Corcoran had the ability [*717] to make a rational choice based on these two erroneous factual premises "[E]ven a partial reliance on an erroneous fact finding can support a finding of unreasonableness" *Ben-Yisrayl v Buss, 540 F 3d 542, 550 (7th Cir 2008)* (discussing *Wiggins v Smith, 539 U S 510, 528, 123 S Ct 2527, 156 L Ed 2d 471 (2003)*; *see also Mendiola, 224 F 3d at 592-93* (state court's finding should be supported by the record) Thus leaves only the third reason provided by the court--Corcoran's own testimony

The Indiana Supreme Court stated that based on Corcoran's testimony at the competency hearing, it was clear that Corcoran understood the nature of the proceedings, the responsibilities of counsel, and the nature of the appellate procedure *Corcoran III, 820 N E 2d at 661*. The court relied very heavily on Corcoran's statement that, "I want to waive my appeals because I am guilty of murder I think that I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever I believe the death penalty is a just punishment for four counts of murder," as an indication that Corcoran could appreciate his position and make a rational choice *Id at 660-61*

The majority [**41] reasons that the Indiana Supreme Court was entitled to believe Corcoran's contention that he wished to waive further proceedings because of his guilt, and I agree that ordinarily, the Indiana court's decision to rely on one person's testimony over other people's testimony would be one to which we would defer *See Herrera v Collins, 506 U S 390, 400-01, 113 S Ct 853, 122 L Ed 2d 203 (1993)* ("upon habeas corpus the court will not weigh the evidence") (citation omitted) But this is not a case where the court picked the opinion of one expert who believed Corcoran could make a rational decision over an expert who disagreed Indeed, the State presented no expert who contradicted the conclusions of these three experts Rather, the person whom the court credited was a person diagnosed with a severe mental illness that causes delusions, who told a doctor and his sister he wanted to die to escape those delusions The medical experts who evaluated Corcoran testified he purposely downplays his illness and is intelligent enough to know how to hide his psychosis In fact, Dr Parker stated that Corcoran "would rather be executed than admit that schizophrenia might be contributing to his desire to die." Those experts all testified [**42] that Corcoran's illness has a direct bearing on his thought process and renders him incapable of making a rational choice The Indiana Supreme Court acknowledged the experts' testimony regarding Corcoran's delusions but it did not discuss his decision to waive postconviction review in light of his delusions [2]

> 2 Corcoran's own words later in the competency hearing further belie the conclusion that he understood and rationally made the choice to waive postconviction relief At the close of the hearing, Corcoran asked the judge what would happen if he found Corcoran incompetent The judge explained that the court would then proceed on the postconviction petition filed by his attorneys If Corcoran understood his position and possessed the ability to make a rational choice among his options, it would seem he would have understood the proceedings that had just taken place

But even if the Indiana Supreme Court could have relied on its own judgment over the opinions of the experts in this case, the factual inaccuracies of the court's two other reasons render its entire finding infirm *See, e g , Miller-El v Cockrell, 537 U S 322, 340, 123 S Ct 1029, 154 L Ed 2d 931 (2003)* ("A federal court can disagree with a state court's [**43] credibility determination and, when guided by AEDPA, conclude that the decision was unreasonable or that [*718] the factual premise was incorrect by clear and convincing evidence.").

The court determined that medication controlled Corcoran's delusions and that the only reason Corcoran himself had ever given for wanting to waive further proceedings was his guilt This might be a different case if those determinations were true Because both determinations are directly contradicted by the record, however, I believe the Indiana Supreme Court's finding is not "fairly supported by the record"; instead, the record clearly contradicts it. *Cf Demosthenes v Baal, 495 U S 731, 735, 110 S Ct 2223, 109 L Ed 2d 762 (1990)* (per curiam) (upholding state court finding that inmate was competent to waive his right to pursue postconviction relief where three psychiatrists determined he was competent) "The [habeas] standard is demanding but not insatiable . . . [d]eference does not by definition preclude relief." *Miller-El v Dretke, 545 U S 231, 240, 125 S Ct 2317, 162 L Ed 2d 196 (2005)* (citation omitted)

For this reason, I would reverse the district court's finding that Corcoran was competent to waive his postconviction proceedings and grant Corcoran a conditional [**44] writ of habeas corpus requiring litigation of Corcoran's postconviction petition in state court I respectfully dissent

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 24, 2009

Before

WILLIAM J. BAUER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

Nos. 07-2093 and 07-2182

JOSEPH E. CORCORAN,
Petitioner-Appellee/
Cross-Appellant,

v.

MARK E. LEVENHAGEN,
Superintendent,

Respondent-Appellant/
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 05 C 389

Allen Sharp,
Judge.

ORDER

On consideration of the petitioner-appellee/cross-appellant's petition for rehearing and suggestions for rehearing *en banc* filed on January 13, 2009, and respondent-appellant/cross-appellee's response filed on February 4, 2009, in connection with the above-referenced case, no judge in active service has requested a vote on the petition for rehearing *en banc* and a majority of the judges on the panel have voted to deny the petition for rehearing.[1] It is, therefore, ORDERED that the petition for rehearing and suggestions for rehearing *en banc* is DENIED.

[1] Although Judge Ann Claire Williams did not call for an *en banc* vote, she did vote to grant the petition for panel rehearing.

LexisNexis

LEXSEE 739 N.E.2D 649

JOSEPH E. CORCORAN, Defendant-Appellant, v. STATE OF INDIANA, Plaintiff-Appellee.

02S00-9805-DP-293

SUPREME COURT OF INDIANA

739 N.E.2d 649; 2000 Ind. LEXIS 1142

December 5, 2000, Decided

SUBSEQUENT HISTORY: Subsequent appeal at *Corcoran v. State, 774 N.E.2d 495, 2002 Ind. LEXIS 688 (Ind., 2002)*
Subsequent appeal at *Corcoran v. State, 2005 Ind. LEXIS 10 (Ind., Jan. 11, 2005)*

PRIOR HISTORY: [**1] APPEAL FROM THE ALLEN SUPERIOR COURT The Honorable Frances C. Gull Cause No. 02D04-9707-CF-465

COUNSEL: For APPELLANT: P. Stephen Miller, Fort Wayne, Indiana, John C. Bohdan, Glasser and Ebbs, Fort Wayne, Indiana

For APPELLEE: Karen M. Freeman-Wilson, Attorney General of Indiana, Priscilla J. Fossum, Deputy Attorney General, Indianapolis, Indiana

JUDGES: DICKSON, Justice. SULLIVAN, BOEHM, and RUCKER, JJ., concur. SHEPARD, C.J., concurs with separate opinion.

OPINION BY: DICKSON

OPINION

[*651] On Direct Appeal

DICKSON, Justice.

A jury found the defendant, Joseph E. Corcoran, guilty of four counts of murder.[1] In the subsequent penalty phase, the jury recommended the death penalty, and the trial court ordered the death sentence imposed. Appealing from the trial court judgment, the defendant does not challenge the guilt phase proceedings or his resulting convictions. His appellate claims concern only the penalty and sentencing proceedings and his death sentence.[2] The defendant's appeal presents eight claims, which we rearrange as follows: (1) the Indiana death penalty statute violates the United States Constitution because a death sentence and a sentence of life without parole (LWOP) [**2] are governed by the same eligibility requirements, (2) the death penalty/LWOP statute is ambiguous and therefore must be construed against the state, (3) the selection phase of the death penalty/LWOP statute violates the federal and state constitutions as it permits the arbitrary imposition of the death penalty, (4) the death penalty/LWOP statute violates the Indiana Constitution's proportionality provision, (5) the death penalty/LWOP statute violates the defendant's right to a jury trial because it allows the State to penalize its exercise, (6) the prosecutor committed misconduct in the closing argument during the penalty phase; (7) the judge improperly considered a non-statutory aggravator when sentencing, and (8) the death sentence in this case is manifestly unreasonable.

1 *IND. CODE § 35-42-1-1*

2 The defendant, by counsel and personal affidavit, filed a written waiver of his right to appeal his convictions but retained the right to appeal his sentence.

Constitutionality of the Death Penalty [3] / Life Imprisonment Statute**

In the first four claims enumerated above, the defendant contends that the Indiana capital sentencing statute facially violates the federal and Indiana constitutions because it permits the sentencer to impose a sentence of death or life imprisonment [*652] without parole based on the same aggravating circumstances.

First, the defendant contends that the eligibility provision of the Indiana sentencing system for the crime of murder violates the *Eighth Amendment to the Constitution of the United States*, "because the Indiana legislature has not deemed any murder such an affront to society that the only appropriate penalty may be death." Brief of Appellant at 22. He argues that, because those persons eligible for the death penalty are also eligible for a sentence of life imprisonment without parole, the Indiana death penalty "constitutes nothing more than purposeless and needless imposition of pain and suffering." Brief of Appellant at 37.

Second, the defendant contends that in the absence of mitigating circumstances, there is no basis under the Indiana system to decide between life imprisonment and the death penalty. He argues that this constitutes an ambiguity [**4] that must be strictly construed against the State.[3]

> 3 As part of this argument, the defendant also claims that the Indiana statute impairs his right to present evidence of mitigating circumstances because, by choosing to present mitigation evidence, a capital defendant runs the risk that the sentencer "may decide that the mitigating circumstances are insufficient," thus "lowering his 50/50 opportunity with only the aggravating circumstances." Brief of Appellant at 38. He argues that, by presenting mitigation, a defendant may provide "a rational basis to decide between LWOP and the death penalty," thus potentially increasing instead of limiting the possibility of a death sentence. Reply Brief of Appellant at 10. We find this argument unpersuasive.

Third, the defendant contends that the Indiana statute materially misguides the sentencer in the selection phase because it permits the sentencer to choose life imprisonment without parole because of retribution if the sentencer believes that death would be a more [**5] merciful sentence. He argues that this results in a potential for substantial unreliability and bias in favor of death sentences.

We address these claims together because we conclude that they are governed by the same principles. Indiana statutes prescribe that the penalty for the crime of murder may be either (a) a determinate term of imprisonment for forty-five to sixty-five years, (b) life imprisonment without parole, or (c) a death sentence. To be eligible for possible imposition of the death penalty or life imprisonment without parole, an offender must have committed a murder accompanied by at least one of several prescribed aggravating circumstances. *IND. CODE § 35-50-2-9(b)*. Under the Indiana statutory scheme, the aggravating circumstances that make an offender eligible for the death penalty are the same that define eligibility for life without parole. If the State seeks the death penalty or life without parole, upon finding one of the prescribed aggravating circumstances proven beyond a reasonable doubt and finding mitigating circumstances outweighed by the aggravating circumstance(s), the trial court, after considering the recommendation of the jury, may impose a sentence [**6] of death or life imprisonment without parole.

The defendant contends that Indiana's death penalty statute is unconstitutional because it fails to delineate between those crimes for which the death penalty is proportional and all other murders and thus fails to reserve the death penalty for the most severe class of crimes. Citing *Arave v. Creech, 507 U.S. 463, 474, 113 S. Ct. 1534, 1542, 123 L. Ed. 2d 188, 200 (1993)*, he argues that this violates a requirement that a capital sentencing statutory scheme must provide a principled basis for differentiating those persons for whom the death penalty is appropriate from those for whom it is not.

In Arave, however, the issue was not whether the class of murderers eligible for the death penalty might alternatively be sentenced to imprisonment. The United States Supreme Court instead addressed whether an Idaho statutory aggravating circumstance that "the defendant exhibited [*653] an utter disregard for human life" adequately channeled sentencing discretion for imposition of a death sentence. *507 U.S. at 465, 113 S. Ct. at 1538, 123 L. Ed. 2d at 194*. The Court reasserted as a "fundamental principle" that

> [**7] to satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must suitably direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action. The State must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and make rationally reviewable the process for imposing a sentence of death.

Arave, 507 U.S. at 470-71, 113 S. Ct. at 1540, 123 L. Ed. 2d at 197-98 (internal quotation marks and citations omitted).

The Indiana capital sentencing scheme satisfies this requirement by prescribing particular aggravating circumstances that narrow the class of murderers eligible for the death penalty. *Judy v. State, 275 Ind. 145, 416 N.E.2d 95, 105-08 (1981)*. We recognize that the Indiana capital sentencing statute "must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Winkler v. State, 690 N.E.2d 1156, 1165*

(Ind. 1997)(quoting *Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235, 249-50 (1983)*) [**8] Even with the addition of life without parole as an alternative punishment for death-eligible murderers, however, the Indiana system "rationally distinguishes between those individuals for whom death is an appropriate sanction and those for whom it is not." *Stevens v. State, 691 N.E.2d 412, 429 (Ind. 1997)*(quoting *Spaziano v. Florida, 468 U.S. 447, 460, 104 S. Ct. 3154, 3162, 82 L. Ed. 2d 340, 352 (1984)*) Just as there is no constitutional defect under the Indiana death penalty statute, which gives the Indiana sentencer discretion to choose between death and imprisonment for a term of years, so also there is no defect in permitting the sentencer to choose the alternative of life imprisonment without parole. *Wrinkles, 690 N.E.2d at 1165*

We conclude the Eighth Amendment is not violated by the Indiana statute's inclusion of life imprisonment without parole as a sentencing alternative using the same aggravating factors as a death sentence.

In the fourth claim of facial unconstitutionality based on the inclusion of the life imprisonment alternative with the death penalty, the defendant contends that the statute violates *Article I, Section* [**9] *16 of the Indiana Constitution*, which provides in relevant part "All penalties shall be proportioned to the nature of the offense." He argues that, because the statute does not identify whether death or life imprisonment is the more severe punishment, it is impossible to assure that the penalty imposed is proportional to the crime committed. Because death or life imprisonment are each grave and extreme punishments and are reserved for only the most extreme murders, in contrast to sentences for a discrete term of years in all other murders, the proportionality provision of the Indiana Constitution is not offended by their equivalent availability under the statute.[4]

4 In this section of his argument, the defendant also includes the claim that the statute violates *Article I, Section 18, of the Indiana Constitution*, which provides "The penal code shall be founded on the principles of reformation, and not vindictive justice." He argues that, by declaring that every murderer eligible for the death penalty may receive life imprisonment, the legislature has established that reformation is the appropriate penal remedy and that the death penalty, based on vindictive justice, should not be permitted. This argument would require that, even without the equivalent availability of life without parole, the death penalty procedure would be unconstitutional because a sentencer would still have the option of imposing death or a term of years. *See Wrinkles, 690 N.E.2d at 1165.* This Court has clearly held this Indiana capital sentencing procedure does not violate Section 18. *Saylor v. State, 686 N.E.2d 80, 88 (Ind. 1997), Harrison v. State, 644 N.E.2d 1243, 1258 (Ind. 1995)*(citing *Fleenor v. State, 514 N.E.2d 80, 90 (Ind. 1987), reh'g denied, cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988), Dinkins v. State, 7 Ind. 338, 342, (1855); Rice v. State, 7 Ind. 332, 338 (1855)), aff'd after remand, 659 N.E.2d 480 (Ind. 1995), reh'g denied, cert. denied, 519 U.S. 933, 117 S. Ct. 307, 136 L. Ed. 2d 224 (1996), Lowery v. State, 478 N.E.2d 1214, 1220 (Ind. 1985), Smith v. State, 465 N.E.2d 1105, 1113 (Ind. 1984).* We decline to hold to the contrary.

[**10]

[*654] **Impingement on Right to Jury Trial**

The defendant contends that Indiana's death penalty scheme impermissibly infringes, facially and as applied, upon the right to jury trial. He argues that, because identical factors may support a prosecutor's decision to seek either death or life imprisonment, the statute enables prosecutors to seek the death penalty "to coerce an individual who refuses to plead guilty to relinquish a constitutional right" to jury trial. Brief of Appellant at 46. The defendant asserts that in his case he declined the State's offer to accept a guilty plea or try his case to the bench and thereby avoid the death penalty. He urges that because the prosecutor thus believed that life imprisonment was the appropriate penalty, the request for the death penalty had no basis except to provide "a strategic advantage . . . to force the defendant to abdicate a basic right." Brief of Appellant at 47.

We disagree. Prosecutors are traditionally given wide discretionary power in our criminal justice system to select the persons to be prosecuted and to plea-bargain with them. The Supreme Court has recognized the benefits of efficiency and speedy dispositions that plea-bargaining [**11] offers, and has fully approved its use as long as it is accompanied by safeguards that insure full knowledge on the part of the defendant offering a guilty plea as to his rights, his consequent waiver of those rights, the crime to which he is pleading guilty, and the maximum penalty or the extent to which he places himself at risk. *Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).* In the context of plea-bargaining, we do not see a material distinction in the discretionary powers of the prosecutor in offering to agree to a lesser sentence for a guilty plea or for a bench trial. Our case law, which proscribes the imposition of a harsher sentence because a defendant exercised his right to jury trial, is rightly focused on the actions of the judge

as sentencer and not the prosecutor as charger. *See Hill v State, 499 N E 2d 1103, 1107 (Ind 1986)*("Whether the severity of a particular sentence was improperly influenced by a defendant's jury trial election requires an individualized consideration." Id Factors to be considered are (1) the role the judge played in the plea negotiations, (2) whether the judge encouraged [**12] the defendant to plead guilty, (3) the presence of threats from the judge of a more severe sentence if convicted following a jury trial, and (4) any evidence that the trial judge penalized the defendant for going to trial *Pauley v State, 668 N E 2d 1212, 1213 (Ind 1996), Hill, 499 N E 2d at 1107 (Ind 1986)*)

The defendant did not waive his right to jury trial and fails to point to anything in the record that indicates he received a more severe sentence from the court because he exercised his right to jury trial Absent a specific showing that a particular sentence was improperly influenced by the defendant's exercise of his right to jury trial, which is not presented here, we decline to reverse.

Prosecutorial Misconduct

The defendant contends that his death sentence should be reversed because some of the prosecutor's remarks during closing arguments in the penalty phase constituted prosecutorial misconduct The defendant urges that the prosecutor's rhetoric was excessively inflammatory and that it concentrated on aggravating circumstances not authorized by the Indiana [*655] death penalty statute The defendant did not object at trial

[**13] Appellate recourse is not available for the review of alleged trial misconduct when the complaining party failed to timely object at trial *Stevens v State, 691 N E 2d 412, 420 (Ind 1997)* The defendant argues that the misconduct constituted "fundamental error," a doctrine under which an appellate claim may be considered notwithstanding the failure of contemporaneous trial objection For this exception to apply, however, we must find that the alleged misconduct so prejudiced the defendant's rights as to make a fair trial impossible Id

Not unlike Stevens, the penalty phase jury instructions here emphasized that, in order to recommend a sentence of death or life without parole, the jury must first unanimously conclude that the State proved beyond a reasonable doubt the existence of the charged aggravating circumstance (that the defendant committed another murder), that this aggravating circumstance was not outweighed by any mitigating circumstances, and that only evidence "which bears directly upon the mitigating factors, or the aggravating factor" could be considered Record at 2462-65, 2468-69, 2472 We conclude that the defendant's allegations [**14] of prosecutorial misconduct in final argument do not show improper prejudice to the defendant's rights thereby making a fair trial impossible This claim does not qualify for the "fundamental error" exception, and it was forfeited by procedural default.

Consideration of Non-statutory Aggravator

The defendant contends that the trial court's imposition of a death sentence violated the *Eighth* and *Fourteenth amendments of the United States Constitution* and *Article 1, Section 16 of the Indiana Constitution* because the trial court considered future dangerousness of the defendant, a circumstance not among the aggravating circumstances authorized by the Indiana death penalty statute.

In deciding whether to order a death sentence, a court must limit its consideration of aggravating circumstances to those specified in the death penalty statute *IND CODE § 35-50-2-9(b), Bivins v State, 642 N E.2d 928, 955 (Ind 1994) Indiana Code Section 35-38-1-3(3)* requires that if the trial court finds aggravating or mitigating circumstances, its record must include "a statement of the court's reasons for selecting the sentence that it imposes" The statement of reasons should [**15] contain three elements a) identification of all significant mitigating and aggravating circumstances found, b) specific facts and reasons which lead the court to find the existence of each such circumstance, and c) articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence *Hill v State, 499 N E 2d 1103, 1107 (Ind 1986), Hammons v State, 493 N E 2d 1250, 1254 (Ind 1986), Jones v State, 467 N E 2d 681, 683 (Ind 1984)*

The requirement for sentencing findings are more stringent in capital cases than in non-capital sentencing situations, and the statement must also set forth the trial court's personal conclusion that the sentence is appropriate punishment for this offender and this crime *Harrison v State, 644 N E 2d 1243, 1262 (Ind 1995)* "We require such specificity in a sentencing order or statement of reasons for imposing a sentence to insure the trial court considered only proper matters when imposing sentence, thus safeguarding against the imposition of sentences which are arbitrary or capricious, and to enable the appellate [**16] court to determine the reasonableness of the sentence imposed." Id , *Daniels v State, 561 N E 2d 487, 491 (Ind 1990), see also Schiro v State, 451 N E 2d 1047, 1053 (Ind 1983)*(finding that a written sentencing statement "guards against the influence of improper factors at the trial level and [*656] [makes] sure that the evils of *Furman v Georgia, 408 U S 238, 92 S Ct 2726, 33 L Ed 2d 346 (1972)*, arbitrary and capricious application of the death penalty, were not

present in the sentencing decision") It is usual practice for a trial judge to comment when the sentence is announced in open court When a trial judge's oral comments refer to factors not included in the court's separate written findings, the issue may arise as to whether such remarks demonstrate impermissible use of a nonstatutory aggravating factor *Bellmore v State, 602 N E 2d 111, 129 (Ind 1992)*

In this case, in which the defendant had been found guilty on each of four counts of murder, the judge in her written sentencing order found that, as to State's application for the death sentence on each count of murder, the State proved beyond [**17] a reasonable doubt that the defendant committed another murder ' The court's sentencing statement reflects that the trial judge thoughtfully considered the nine mitigating circumstances asserted by the defendant and concluded that the following were shown the defendant was under the influence of a mental or emotional disturbance at the time the murders were committed; the defendant cooperated fully with investigating authorities, reducing the potential for additional harm and furthering the State's case against himself, the defendant lacked a significant criminal history; and the defendant indicated remorse The trial court articulated its evaluation that each of the mitigating circumstances was of medium or low weight. It concluded

Pursuant to *I C 35-50-2-9(l)* the Court has balanced the aggravating circumstances proved by the State against the mitigating circumstances proved by the Defendant. The Court finds that the knowing and intentional murders of four (4) innocent victims to be particularly heinous crimes [sic] The Court weighs this aggravating circumstance very high The Court, having evaluated and balanced these circumstances finds that the aggravating circumstances [**18] outweigh the mitigating circumstances The Court again finds that the mental or emotional disturbance suffered by the Defendant did not affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law

> 5 One of the aggravating circumstances enumerated in the death penalty statute is "The defendant has committed another murder, at any time regardless of whether the defendant has been convicted of that murder." *IND CODE § 35-50-2-9(b)(8)*. This subsection is only available in cases involving double or multiple murders for which the defendant is being tried in one proceeding *Williams v State, 669 N E 2d 1372, 1389 (Ind 1996)*

The Court, having considered the jury's recommendation that the death penalty be imposed now finds that such a sentence is supported by the facts and the evidence, and the character of the Defendant, and therefore orders that the Defendant be executed pursuant to Indiana law

Record at 2577-78.

[**19] In her oral remarks in open court at the time of sentencing, the trial judge stated in part

Pursuant to the law, *Indiana Code 35-50-2-9(k)*, I'm required to balance aggravating circumstances proved by the State of Indiana against mitigating circumstances proved by the Defense. That has been a very difficult process, and not a process that I have ever taken lightly, and certainly would never take lightly, Mr Corcoran Your emotional and mental disturbance is of concern to this Court Also of concern to this Court is that none of the experts can seem to give me a straight answer, Mr Corcoran, of what is really going on inside your head And maybe it is as [the prosecutor] argued in his closing, that society just cannot begin to comprehend why you would do what you did, so we've got to say, there's got to be something wrong with this guy to have done [*657] what he did I'm not going to say that, Mr. Corcoran, because I don't know I do know, however, that the knowing and intentional murders of four innocent people is an extremely heinous and aggravated crime. That makes you, Mr Corcoran, a mass murderer. [The prosecutor] is right. I don't think in the history of this county we've [**20] had a mass murderer such as yourself It makes you Mr. Corcoran, a very dangerous, evil mass murderer And I am convinced in my heart of hearts, Mr Corcoran, if given the opportunity, you will murder again.

Record at 2915-16 After this passage, the judge goes on to weigh the aggravator and the mitigators The defendant argues that the above passage demonstrates that, in making her determination, the judge considered future dangerousness, which is not one of the enumerated aggravating circumstances permitted under the Indiana death penalty statute

In addition to the Court's oral remarks regarding future dangerousness, we also observe that the sentencing statement itself suggests that, in balancing aggravating and mitigating circumstances, the trial court may have also considered that there were "four innocent victims" and that the crimes were "particularly heinous," neither of which are among the prescribed statutory aggravating circumstances that may be weighed in deciding whether to impose the death penalty Record at 2577-78

Because the circumstances of a crime often provide "an appropriate context for consideration of the alleged aggravating and mitigating circumstances, [**21] " we recognize that reference to the nature and circumstances of the crime in the sentencing statement "does not neces-

sarily compel a conclusion that such matters were improperly considered and weighed as aggravating circumstances." *Prowell v. State, 687 N E 2d 563, 567 (Ind 1997)* When the judge's oral remarks at sentencing refer to matters not included in the written sentencing statement, a reviewing court must evaluate the degree to which the judge may have relied upon the non-statutory factor *Bellmore, 602 N E 2d at 128 n 6* The same consideration is likewise appropriate in evaluating the role of non-statutory aggravating matters noted in the written sentencing statement In the absence of clear contrary indications in the record, however, we will assume the sentencing order fully discloses the factors considered by the sentencing judge *Prowell, 687 N E 2d at 567-68*

From the combination of the trial court's remarks in open court that she was "convinced in her heart of hearts" that the defendant, "if given the opportunity, would murder again," Record at 2916, and of the court's written references in the sentencing statement [**22] to the innocence of the victims and the heinousness of the murders, we find a significant possibility that the trial court may have relied upon non-statutory aggravating factors in deciding whether to impose the death penalty We therefore remand this cause to the trial court to redetermine from the evidence already presented whether to impose the death sentence, life without parole, or a term of years, based only upon mitigating and proper aggravating circumstances, and to issue a new sentencing statement *

> 6 In the event the trial court sentences the defendant to death or life without parole, its statement of reasons "(i) must identify each mitigating and aggravating circumstance found, (ii) must include the specific facts and reasons which lead the court to find the existence of each such circumstance, (iii) must articulate that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence, and (iv) must set forth the trial court's personal conclusion that the sentence is appropriate punishment for this offender and this crime." *Harrison v. State, 644 N E 2d 1243, 1262 (Ind 1995)*

[**23] Conclusion

The judgment of the trial court is affirmed [*658] except as to the death sentence, 7 which is vacated, and this cause is remanded to the trial court to reconsider its sentencing determination and to enter a new sentencing statement and judgment, in accordance with this opinion

> 7 We therefore decline to address the defendant's contention that the death sentence should be revised as manifestly unreasonable

SULLIVAN, BOEHM, and RUCKER, JJ., concur

SHEPARD, C J., concurs with separate opinion

CONCUR BY: SHEPARD

CONCUR

December 6, 2000

SHEPARD, Chief Justice, concurring

I join in the Court's decision to remand, largely because meticulous attention to capital cases at an early stage saves a good deal of effort later on

I read Judge Gull's statements about Corcoran's multiple murders as explanations about why she gave high weight to the (b)(8) aggravator and I would be willing to affirm her on that basis, as it takes little analysis to conclude that four killings make for a [**24] weighty aggravating circumstance Nevertheless, I agree that it is worth clarifying now that only statutory aggravating circumstances are being considered

LexisNexis

LEXSEE

JOSEPH E. CORCORAN, Appellant (Petitioner below), v. STATE OF INDIANA, Appellee (Defendant below).

NO. 02S00-0304-PD-00143

SUPREME COURT OF INDIANA

829 N.E.2d 655; 2005 Ind. LEXIS 10

January 11, 2005, Decided

SUBSEQUENT HISTORY: Rehearing granted by *Corcoran v. State, 2005 Ind. LEXIS 448 (Ind., May 12, 2005)* Adhered to *Corcoran v. State, 827 N.E.2d 542, 2005 Ind. LEXIS 447 (Ind., May 12, 2005)*

PRIOR HISTORY: [**1] Appeal from the Allen Superior Court, No. 02D04-9707-CF-465 The Honorable Frances C. Gull, Judge. On Petition To Transfer from the Allen County Superior Court, No. 02S00-0304-PD-143
Corcoran v. State, 739 N.E.2d 649, 2000 Ind. LEXIS 1142 (Ind., 2000)

DISPOSITION: Corcoran's request for dismissal denied, trial court's determination of competency affirmed.

COUNSEL: ATTORNEYS FOR APPELLANT: Susan K. Carpenter, Public Defender of Indiana, Joanna McFadden, Deputy Public Defender, Indianapolis, Indiana

ATTORNEYS FOR APPELLEE: Steve Carter, Attorney General of Indiana, Stephen R. Creason, Deputy Attorney General, Indianapolis, Indiana

JUDGES: Sullivan, Justice.

OPINION BY: Sullivan

OPINION

[*656] **Sullivan, Justice.**

Joseph E. Corcoran, convicted of four murders and sentenced to death, indicated that he believed he should be put to death for his crimes and waived any further legal review of his convictions and sentence. [*657] The State Public Defender took the position that he was not competent to make that decision. The trial court with responsibility for this case found Corcoran to be competent and the State Public Defender appealed that determination. Recently, Corcoran recanted his waiver of further review and now seeks dismissal of this appeal. For the reasons set forth in this opinion, we deny Corcoran's recent request for dismissal and affirm the trial court's determination [**2] of competency.

Background

Corcoran killed his brother, his sister's fiance, and two other men in an incident at his sister's home. He was convicted of four counts of murder in May, 1999, and sentenced to death. Corcoran sought appellate review only of his death sentence, he did not challenge the convictions.[1] This Court affirmed the sentence. *Corcoran v. State, 774 N.E.2d 495 (Ind. 2002)*. Corcoran filed a petition seeking rehearing that was denied on March 4, 2003. *2003 Ind. LEXIS 265 (Ind. 2003)*

1 Corcoran, "by counsel and personal affidavit, filed a written waiver of his right to appeal his convictions but retained the right to appeal his sentence." *Corcoran v. State, 739 N.E.2d 649, 654 n.2 (Ind. 2000)*

Indiana law provides procedures for individuals sentenced to death to challenge their sentences even after they have been affirmed by the State Supreme Court by means seeking "post-conviction remedies." To avail oneself of these remedies, an individual [**3] sentenced to death must comply with certain provisions of the Indiana Rules of Criminal Procedure and Rules of Procedure for Post Conviction Remedies.

Indiana Criminal Procedure Rule 24(G)(2) provides

> On the thirtieth (30th) day following completion of rehearing, the Supreme Court shall enter an order setting an execution date, unless counsel has appeared and requested a stay in accordance with section (H) of this rule.

Section H provides:

> Within thirty (30) days following completion of rehearing, private counsel retained by the inmate or the State Public Defender (by deputy or by special assistant in the event of a conflict of interest) shall enter an appearance in the trial court, advise the trial court of the intent to petition for post-conviction relief, and request the Supreme Court to extend the stay of execution of the death sentence . . . . When the request to extend the stay is received, the Supreme Court will direct the trial court to submit a case management schedule consistent with *Ind. Code § 35-50-2-9(i)* for approval.

On April 2, 2003, the State Public Defender appeared and requested a stay in accordance with these provisions. [**4] This Court granted the request and, pursuant to our order, the trial court submitted a case management schedule requiring a Petition for Post-Conviction Relief to be filed by September 9, 2003.

A Petition for Post-Conviction Relief must be signed by the petitioner. *Indiana Post-Conviction Rule 1(3)*. Corcoran refused to sign a Petition. On September 9, the State Public Defender made two filings of relevance to us here with the trial court that has jurisdiction over this case. First, she filed a Petition for Post-Conviction Relief unsigned by the petitioner. And second, she filed a request to determine Corcoran's competency. The trial court refused to allow the Petition because it was unsigned but did schedule a competency hearing.

[*658] The trial court held a hearing on Corcoran's competency in October, 2003. In December, 2003, the trial court found Corcoran to be competent to waive further challenges to his sentence and be executed. The State Public Defender then sought our review of the trial court's determination. The State has not disputed that the State Public Defender has standing to appeal the trial court's competency determination, although the State does argue that the lawyers [**5] do not have standing to raise any other issues on Corcoran's behalf.[2]

> 2 "The State does not challenge the Public Defender's standing to appeal the competency determination. While a challenge that standing is absent may be possible, the State believes that a litigant's competency in a death penalty case must be reviewable. Just as an attorney has standing to question a defendant's competency to stand trial, so too should that attorney have standing to raise the issue on appeal. Indeed, that has long been the practice not only in this State but nationally as well. As such, the State believes that the Public Defender's standing in this case is limited to the competency issue only and all other issues may only be raised by Corcoran. Corcoran has not done so, this Court should decline the Public Defender's invitation to conduct what is essentially the post-conviction review that Corcoran does not want to pursue." Br. of Appellee at 18-19.

On November 16, 2004, Corcoran filed a request with this Court, accompanied [**6] by an affidavit indicating his intention to pursue post-conviction relief after all, asking us to dismiss this appeal of the trial court's competency determination as moot and return this case to that court for post-conviction proceedings.

As discussed supra, Corcoran has never filed a petition for post-conviction relief and the time to do so has, as best as we can determine, now passed. See Crim. R. 24(H) (petitions for post-conviction relief in capital cases must be filed within 30 days following completion of rehearing).[3] Therefore, the ability of Corcoran to obtain post-conviction review of his convictions or sentence at this point is dependent upon the resolution of issues raised by this appeal. We conclude it is in the best interest of the orderly processing of this litigation for this Court to complete review of the issues raised in this appeal at this time. For this reason, Corcoran's motion to dismiss this appeal is denied.

> 3 The determination of the timeliness of a petition for post-conviction relief initially is a matter for the post-conviction court, not this Court. While there may be some basis for Corcoran to proceed notwithstanding the time deadline of *Criminal Rule 24(H)*, it is not apparent to us. Consequently, we proceed on the assumption that a petition for post-conviction relief filed by Corcoran at this point would ultimately be dismissed as not timely under *Criminal Rule 24(H)*.

[**7] We proceed to address the issues initially raised in this appeal.

Discussion

I

The State Public Defender attacks the trial court's competency determination on three grounds First, she argues that the trial court applied an improper standard to determine competency Second, she contends as a factual matter that Corcoran is incompetent to waive post-conviction review under any competency standard this Court might choose to employ Third, she maintains that as a result of Corcoran's incompetence, he could not knowingly, voluntarily, or intelligently waive his right to post-conviction relief

A

The State argues that the proper standard for determining the level of competency necessary for Corcoran to waive his right to post-conviction review was that set forth in *Dusky v United States, 362 U S 402, 4 L Ed 2d 824, 80 S Ct 788 (1960)* (per curiam). [*659] In Dusky, the Supreme Court held that a defendant is competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and has a rational as well as factual understanding of the proceedings against him" *362 U S at 402* [**8] The State relies on this standard in part because it is consistent with *Indiana Code section 35-36-3-1*, Indiana's statutory trial competency standard. [4]

> 4 *Indiana Code section 35-36-3-1* reads in relevant part that "if the court finds that the defendant has the ability to understand the proceedings and assist in the preparation of the defendant's defense, the trial shall proceed"

The State Public Defender argues that the proper competency standard is that announced in *Rees v Peyton, 384 U S 312, 16 L Ed 2d 583, 86 S Ct 1505 (1966)* (per curiam) In Rees, the Supreme Court held that a capital defendant may withdraw a petition for certiorari only after it is determined whether "he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the [**9] premises" *Rees, 384 U S at 314*

We are constrained to say that we find little if any difference between the standards enunciated in Dusky and Rees. See *Godinez v Moran, 509 U S 389, 398 n 9, 125 L Ed 2d 321, 113 S Ct 2680 (1993)* (acknowledging that the difference between the Dusky and Rees standards is not readily apparent and may only be one of terminology) A number of federal courts that have faced this question have been unable, or felt it unnecessary, to attempt to discern a difference between the two tests. See *Dennis v Budge, 378 F 3d 880, 889 (9th Cir 2004)* (refusing to resolve whether there is any difference between the Rees and Dusky standards because the analytical outcomes under each test would be the same), *Michael v Horn, 2004 U S Dist LEXIS 3702 (M D Pa 2004)* (relying on both the principles of Rees and Dusky to determine competency to forego a collateral challenge), *Groseclose v Dutton, 594 F Supp 949, 957 n 4 (M D Tenn 1984)* (stating that Dusky is analytically equivalent to the Rees competency test)

Federal courts have been unwilling or [**10] unable to distinguish between the Rees and Dusky standards because both tests "highlight[] the constitutional necessity that a criminal defendant understand the proceedings and then be capable of aiding his legal counsel in choosing among legal alternatives." *Groseclose, 594 F Supp at 957 n 4* Under both standards, the inquiry focuses on the individual's "discrete capacity to understand and make rational decisions concerning the proceedings at issue " *Mata v Johnson, 210 F 3d 324, 329 n 2 (5th Cir 2000)* Further, neither test treats "the presence or absence of mental illness or brain disorder [as] dispositive" proof of incompetence, but balances its presence or absence with other evidence. Id. Both tests appear to be equivalent in that each is applied in the same way to determine whether an individual has the capacity to comprehend the legal proceedings with which he or she is confronted and assist his or her counsel in choosing among the various legal alternatives

For these reasons, we will evaluate the post-conviction court's competency determination under the principles of both standards

[*660] B

We have previously [**11] been required to review a post-conviction court's competency determination in a capital proceeding *Timberlake v State, 753 N E 2d 591, 597 (Ind 2001)* [5] In Timberlake, we held that a post-conviction court's competency findings are afforded a high level of deference by a reviewing court The court's decision will be disturbed only "if the evidence is without conflict and leads only to a conclusion contrary to the result of the post[-]conviction court" *Id at 597*

> 5 In Timberlake, we stated that any
>
> claim of incompetence in a post-conviction proceeding presents two distinct issues (1) whether [petitioner is] "incompetent," or unable to assist his counsel in the preparation of his case and to understand the nature of the post-conviction proceedings, and (2) whether "competence," as that term is understood in cases addressing a defendant's due process rights at trial, is required in post-conviction proceedings.

[**12] The post-conviction court here acknowledged in its written findings that Corcoran suffers from a mental illness The State also concedes that Corcoran suffers from a mental illness At the competency hearing, the State Public Defender presented the testimony of three mental health experts, [6] each of whom concluded that Corcoran suffers from paranoid schizophrenia One of the symptoms of Corcoran's condition, according to the three experts, are recurrent delusions that Department of Correction prison guards are torturing him through the use of an ultrasound machine, causing him substantial pain and uncontrollable twitching

> 6 Clinical psychologist, Dr Robert G Kaplan, forensic psychiatrist, Dr George Parker, and clinical neuro-psychologist, Dr. Edmund C Haskins, each separately examined Corcoran Each expert reviewed Corcoran's mental health records and conducted interviews with him in coming to their conclusions

On the basis of this diagnosis, all three experts concluded Corcoran was unable to make a [**13] rational decision concerning the legal proceedings confronting him. Each expert stated that Corcoran's decision to forego post-conviction review of his sentence, thereby hastening his execution, was premised on his desire to be relieved of the pain that he believes he experiences as a result of his delusions To follow the experts' logic, Corcoran's decision to forego post-conviction review cannot be rational if based upon his delusions, which are irrational

Corcoran, however, made no statement to any of the experts evaluating him indicating that he wished to end his appeals in order to escape his paranoid delusions [7] Corcoran's prison medical records and the testimony of each expert indicated that his psychotic symptoms were being controlled through various psychiatric medications Corcoran himself spoke directly to his reasons for not pursuing post-conviction review and the contention that his delusions were prompting his actions at the post-conviction hearing stating

> 7 Drs Kaplan's and Haskins's conclusions were derived from letters Corcoran wrote to his attorneys and sister stating his willingness to be put to death to gain a sense of relief from prison life

[**14]

> See, I want to waive my appeals because I am guilty of murder I think that I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever I am guilty of murder. I should be executed That is all there is to it That is what I believe. I believe the death penalty is a just punishment for four counts of murder, and I believe that I should be executed since I am guilty of four counts of murder

[*661] (Super Ct. Hr'g Tr at 89) Corcoran's explicit denial that his delusions prompted him to waive his right to post-conviction review and his reasoning that his death sentence is commensurate with the crime he committed (the conclusion to which both the original trial court jury and judge came), makes it impossible for this Court to conclude that "the evidence is without conflict and leads only to a conclusion contrary to the result of the post[-]conviction court" *Timberlake, 753 N E 2d at 597*.

Moreover, there is substantial evidence of record that Corcoran was aware of his legal position and the consequences of his decision to forego any further post-conviction review When asked whether Corcoran has the capacity [**15] to understand his legal position, Dr George Parker, who evaluated Corcoran in preparation for his post-conviction hearing stated

> He has a very clear awareness of the status of his case He is aware he has been sentenced to death He is aware that he is in the appeals process. He has a good memory of the events that have taken place from the time of the offense to the trial, to the sentencing phase, and then through the more extensive appeals phase He is aware of the attorneys' positions and how, how the attorneys have changed over the course of the trial and then [the] appeals process So, he has a good understanding of what is at issue.

(Super Ct Hr'g Tr at 48) Dr Robert Kaplan, who also evaluated Corcoran, testified that Corcoran was aware that by not continuing with post-conviction review that he would be executed.

Corcoran was questioned directly by both the State's attorney and the presiding judge regarding his awareness of the proceedings and his legal position The State's attorney asked the following questions

> Question Do you understand that by waiving these appeals, you are going to

make that happen (his execution) relatively soon?

Corcoran: Yes, [**16] I understand.

Question: Do you understand that this appellate process is the opportunity for you to fight to stay alive?

Corcoran: Yes, I understand.

Question: And you are willing to accept the sentence that was handed down by this Court?

Corcoran: Correct.

(Super. Ct. Hr'g. Tr. at 13).

The post-conviction court then questioned Corcoran with respect to the entire history of his case. Corcoran stated that he was aware that he had been convicted of four capital crimes. He related that he understood the purpose of his initial direct appeal to the Indiana Supreme Court to review his death sentence and that his appeal had been unsuccessful. The judge then asked the following questions in order to ascertain Corcoran's level of awareness of the post-conviction proceedings taking place:

> The Court: [Do] you understand that these proceedings are your last attempt to review this case?
>
> Corcoran: Yes, I understand.
>
> The Court: Do you also understand that if the review here, were it necessary up on appeal, is unsuccessful, that you would be executed?
>
> Corcoran: Yes, I understand.
>
> The Court: Has anyone, Mr. Corcoran, forced you to waive your rights to appeal?
>
> Corcoran: No. [**17]
>
> The Court: Has anyone threatened you to waive your rights to appeal?
>
> Corcoran: No.
>
> [*662] The Court: Did anybody tell you, anybody at all, tell you that you would get more favorable treatment if you waived your right to appeal?
>
> Corcoran: No.
>
> The Court: You understand that the two ladies sitting to your left are appointed by the Court to represent you?
>
> Corcoran: Right, yes.
>
> The Court: Do you trust their judgment?
>
> Corcoran: I disagree with them, but I trust their judgment.
>
> The Court: What do you disagree with them about?
>
> Corcoran: They didn't have to call a competency hearing, but they did anyway. I disagree with calling the competency hearing.
>
> The Court: You disagreed with them filing that motion?
>
> Corcoran: Correct.
>
> The Court: And you understand what their (defense attorneys') responsibilities are?
>
> Corcoran: Yes.
>
> The Court: And what [the deputy attorney general's] responsibilities are?
>
> Corcoran: Yes.
>
> The Court: And what my responsibilities are?
>
> Corcoran: Yes.
>
> The Court: And you know what we are doing here today?
>
> Corcoran: Yes.
>
> The Court: What were we doing here today?
>
> Corcoran: Determining my competency whether or not I am able to make a decision or not.

(Super. [**18] Ct. Hr'g. Tr. at 87-88). Both the State's and post-conviction judge's questioning of Corcoran reaffirm the testimony of Dr. Parker that Corcoran was able to appreciate the gravity of his legal position and the consequences of his choice to waive further post-conviction review. The portions of the record described and set forth supra are also sufficient evidence to support the post-conviction court's determination that Corcoran

made his choice knowingly, voluntarily, and intelligently

Corcoran's awareness of his legal position and his ability to formulate a rational justification for forgoing further post-conviction review make him competent to waive such review under either *Rees* or *Dusky*. The evidence supports the trial court's conclusion that Corcoran has both a rational understanding of and can appreciate his legal position Further, the evidence does not conclusively indicate that Corcoran's decision was not made in a rational manner Thus, we are unable to conclude that "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court," and so we affirm its competency finding *Timberlake v State, 753 N E 2d at 597* [**19] (citing *Harrison v State, 707 N E 2d 767, 773 (Ind 1999)*)

II

In addition to challenging the post-conviction court's competency determination, the State Public Defender raises two additional claims First, the State Public Defender contends that the Constitution and the Indiana death penalty statute required this Court's "review of issues regarding Corcoran's convictions" even though he affirmatively waived such review. Second, the State Public Defender maintains that it would be unconstitutional to execute "a severely mentally ill person, such as Corcoran."

The State, as noted in footnote 2 supra and accompanying text, contends that the [*663] State Public Defender is not entitled to litigate these claims in this proceeding

We agree with the State on this point. Corcoran himself did not authorize this proceeding within the timeframe required by *Criminal Rule 24(H)* and without his authority, neither the trial court in this proceeding nor this Court has jurisdiction to review claims for post-conviction relief See P-C R 1(3) (A petition for post-conviction relief "shall be submitted in a form in substantial compliance with the standard form appended [**20] to this rule The petition shall be made under oath and the petitioner shall verify the correctness of the petition") While we recognize and appreciate that the State Public Defender raises these claims in the sincere belief that Corcoran is incompetent and did not knowingly, voluntarily, and intelligently waive his right to post-conviction review, that belief alone is not sufficient to overcome the rule's requirement

In any event, had we found Corcoran incompetent or otherwise not to have knowingly, voluntarily, and intelligently waived his right to post-conviction review, we in an abundance would have remanded to the post-conviction court for its review of these claims But we feel constrained to say that both contentions appear to constitute free-standing claims of error that would not be available for post-conviction review *Williams v State, 808 N E 2d 652, 659 (Ind 2004)* ("If the issue is not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding, but as a general rule, 'most free-standing claims of error are not available in a postconviction proceeding because of the doctrines [**21] of waiver and res judicata.'") (quoting *Timberlake, 753 N E 2d at 597-98*)

III

To litigate the post-conviction claims discussed in Part II, Corcoran himself would need to authorize such a proceeding As discussed in Background, supra, Corcoran has recently indicated a desire to do so but it appears to us that the deadline for filing a petition for post-conviction relief has long since passed See *Crim R 24(H)*. The procedural posture of Corcoran's case and our precedent in *Judy v State, 275 Ind 145, 416 N E 2d 95 (Ind 1981)*, cause us to reflect upon whether we should extend to individuals sentenced to death automatic post-conviction review in addition to automatic review on direct appeal.

In *Judy v State*, the defendant had been convicted of four counts of murder and sentenced to death. *Judy, 416 N E 2d at 100*. After his conviction and sentencing, Judy requested that he be permitted to waive his appeal Id We found Judy competent to waive his appeals, but refused to allow him to do so without further review to ensure that his sentence had been imposed fairly [8] *Id at 102* We held that "the death [**22] sentence cannot be imposed on anyone in this State until it has been reviewed by this Court and found to comport with the laws of this State and the principles of our state and federal constitutions" *Id*

> 8 Thirty-seven of the 38 states that allow the death penalty require appellate review of capital convictions and sentences See U S. Dep't of Justice, Bureau of Justice Statistics, Bulletin Capital Punishment 3 (2000)

In addition to promoting society's interest in certainty that when capital punishment is imposed, it is appropriate in light of the nature of the offense and character of the offender, automatic post-conviction review would assure that issues unavailable or otherwise not raised at trial that [*664] bear upon the propriety of the sentence would be reviewed The State Public Defender's request here that we review Corcoran's waiver of review on direct appeal of issues relating to his convictions and the constitutionality of the execution of a severely mentally ill person illustrates this point. [**23] While as

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free-standing claims of error, these contentions would unlikely be available for post-conviction review, they could well form the basis of claims of ineffective assistance of trial or direct appeal counsel See generally *Woods v State, 701 N E.2d 1208 (Ind 1998)* (concluding that collateral review will often be the only means to contest the effectiveness of trial or direct appeal counsel). Automatic post-conviction review would permit adjudication of whether Corcoran was the victim of constitutionally deficient performance by counsel at his trial and during his direct appeal

On the other hand, post-conviction proceedings differ markedly from direct appeal They occur after the direct appeal stage when the defendant's and society's interests in prolonging capital litigation weakens. One commentator has formulated this analysis as follows

> A defendant seeking to waive proceedings for the first time at the post-conviction relief stage is more likely to have been appropriately convicted and sentenced than a defendant seeking to waive proceedings at the early stages Such a defendant has received a full trial, full sentencing hearing and full appellate review [**24] Every stage serves as a checkpoint, an additional safeguard filtering out the impurities. A defendant is less likely to be wrongfully sentenced to death after each stage Information is gained at the completion of each stage Any other conclusion would suggest that each [previous] proceeding serves no valuable purpose and would degrade the entire capital proceeding to nothing more than a random game of chance Therefore, because each stage reduces the chance that a defendant has been inappropriately sentenced to death, the risk of arbitrary application of the death penalty is much lower at the post-conviction relief stage than at previous stages

Anthony J Casey, Maintaining the Integrity of Death An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings, *30 Am Jour Crim L 75, 103 (2002)* We generally agree

We conclude that, at the post-conviction stage, the interest in achieving finality outweighs the benefits of mandating further review [9] We decline to extend automatic post-conviction review to capital litigants who do not seek such review within the time limits imposed upon them by the Indiana Rules [**25] of Criminal Procedure

> 9 In fact, only one state requires collateral review of death sentences New Jersey prohibits capital defendants from waiving post-conviction review in part because "there are some issues that one simply cannot raise on direct appeal " *New Jersey v Martini, 144 N J 603, 677 A 2d 1106, 1110 (N J 1996)* The Supreme Court of New Jersey cites issues such as ineffective-assistance of counsel claims as "particularly well-suited for post-conviction review." *Martini, 677 A 2d at 1110*. Nevertheless, even the New Jersey Court recognizes the state's "strong interest in achieving finality," id , at this stage in the proceedings and provides a capital defendant who does not desire post-conviction review only an abbreviated hearing schedule. *Id at 1113*.

Conclusion

We affirm the post-conviction court's competency finding with respect to Corcoran's ability to waive further collateral review. We hold that the State Public Defender does not have [**26] standing to raise the other claims she presents without Corcoran's [*665] consent. And we decline to adopt a policy that would extend automatic post-conviction review to all death sentences

The parties are entitled to seek rehearing from this decision in accordance with *Indiana Appellate Rule 54*. In the event rehearing is not sought or denied, this Court shall enter an order on the 30th day following completion of appellate review, i e , the later to occur of the date of this decision if rehearing is not sought or the date rehearing is denied setting an execution date See *Criminal Rule 24(H)*

Shepard, C J , and Dickson and Boehm, JJ , concur Rucker, J , dissents with separate opinion.

DISSENT BY: Rucker, Justice, dissenting

DISSENT

I respectfully dissent because I believe Corcoran is not competent to waive his right of post-conviction review.

At his sentencing hearing several years ago, the trial court found that Corcoran "has proved the mitigating circumstance that he was under the influence of a mental or emotional disturbance at the time the murders were committed on July 26, 1997." *Corcoran v State, 774 N E 2d 495, 499 (Ind 2002)* Although this circumstance [**27] was accepted by the trial court, nonetheless found that "Dr Engum's opinion at trial was con-

sistent with the opinions of the Court appointed experts that the Defendant suffered from a personality disorder, either paranoid personality disorder, or schizotypal personality disorder." Id. It is apparent that since July 1997 Corcoran's mental state has deteriorated significantly. So much so that his personality disorder has now developed into full-blown paranoid schizophrenia. In short, Corcoran is seriously mentally ill. And how does his mental illness manifest itself? Corcoran is under the paranoid delusion that prison guards are torturing him with sound waves. As a result, Corcoran wants the State to execute him in order to end the pain. I am not willing to accommodate him.

The majority places great weight on Corcoran's own representation that he is not incompetent and wishes to forgo further judicial review, not because of his paranoid delusions, but rather because he is guilty of murder and should be punished. According to the majority, "Corcoran's awareness of his legal position and his ability to formulate a rational justification for forgoing further post-conviction [**28] review make him competent to waive such review . . ." *Slip op. at 10.*

In Rees v. Payton, the Supreme Court declared that in the context of a party's ability to waive his right to further appeals a court must determine, "whether [the petitioner] has capacity to appreciate his position and make a *rational choice* with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *384 U.S. 312, 314, 16 L. Ed. 2d 583, 86 S. Ct. 1505 (1966)* (per curiam) (emphasis added). This test is slightly different than the one announced in *Dusky v. United States, 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960)* (per curiam), where the Court considered the standard for determining competency to stand trial. In Dusky the Court stated that the "test [for competency] must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." *Id. at 402.*

In my view, the ability to consult [**29] with one's lawyer and to have an understanding of the legal proceedings is not quite the same as the ability to make a rational [*666] decision to forgo additional judicial review. It is not inconceivable that a defendant may have the ability to consult with counsel and have complete understanding of the proceedings against him and yet, because of a mental disease or defect, make an irrational decision regarding the pursuit of further litigation. See, e.g., *Dennis ex rel. Budro v. Budro, 378 F.3d 880, 888 (9th Cir. 2004)* (discussing, but not applying, Rees question as applied to a defendant suffering a mental illness but understanding the court proceedings is "If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a *rational* choice among his options?") (emphasis added) (citing *Rumbaugh v. Procunier, 753 F.2d 395, 398 (5th Cir. 1985)*).

In any event, even assuming the two tests are indistinguishable, the fundamental requirement underlying any notion of competency still must [**30] be one of rationality. See, e.g., *Matheney v. Anderson, 377 F.3d 740, 747 (7th Cir. 2004)* (Under Dusky, a defendant may not be tried unless he has "a rational as well as factual understanding of the proceedings against him.") (citations omitted); *Budge, 378 F.3d at 890* ("The question under Rees . . . is not whether mental illness substantially affects a decision, but whether a mental disease . . . substantially affects the prisoner's capacity to appreciate his options and make a rational choice among them.") (citations omitted); *Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989)* (Under Rees, the question is "whether [the defendant] had the capacity to appreciate his position and make a rational decision . . .").

In this case, the three mental health professionals testifying at Corcoran's competency hearing concluded that Corcoran was not competent to make a rational decision concerning his litigation. Their testimony on this point should be given credence. The first mental health professional to testify was Doctor Robert G. Kaplan, a clinical psychologist. After reviewing voluminous documents, including the psychological [**31] reports of several other doctors, and after interviewing Corcoran himself for approximately four hours, Dr. Kaplan reached certain conclusions. I recount the following exchange in some detail:

> [Defense Counsel] Okay. Do you think Mr. Corcoran has the capacity to appreciate the legal position in any of these things?
>
> [Dr. Kaplan] No.
>
> [Defense Counsel] Why are you saying that?
>
> [Dr. Kaplan] I believe that he is delusional, that there are, that he is suffering from a severe mental illness, paranoid schizophrenia that is causing him to believe things about his situation that has affected his ability to make appropriate decisions regarding his defense and how to proceed.

[Defense Counsel] What is this delusion?

[Dr. Kaplan] He has actually two delusions. The first delusion is that the guards are operating an ultrasound machine that is causing him, his body to twitch and move uncontrollably, that it is causing him pain as well Um, and he has another delusion in which he believes that he is saying things, um, without, um, knowing what he is saying that is causing other people to, to um, become angry at him, to make fun of him

(Super Ct Hr'g [**32] Tr at 11-12)

[Defense Counsel] Okay Does Mr Corcoran have the capacity to make a rational [*667] choice with respect to abandoning litigation?

[Dr Kaplan] No.

[Defense Counsel] Why is that?

[Dr Kaplan] Again, he has, he has-- he has a psychosis which is paranoid schizophrenia that is leading him to believe that, you know, one of the reasons that he wants to die is because he doesn't want to continue with this speech disorder that he really doesn't have And another reason he wants to die is because he doesn't want to continue to be a victim of the guards' ultrasound machine. And that is a highly bizarre belief that is not likely to be in existence either

(Super Ct Hr'g Tr at 14)

[Defense Counsel] Is Mr Corcoran suffering from a mental disease, disorder, or defect?

[Dr Kaplan] He is suffering from a very severe mental disease and defect

[Defense Counsel] What mental disease is that?

[Dr. Kaplan] Paranoid schizophrenia

[Defense Counsel] Does that mental disease affect his capacity to make a rational choice in abandoning this litigation?

[Dr. Kaplan] Could you repeat the question?

[Defense [**33] Counsel] Does his paranoid schizophrenia affect his capacity to make a rational choice to abandon further litigation?

[Dr Kaplan] Yes

[Defense Counsel] At the risk of being repetitive, how, how does his paranoid schizophrenia affect his rational choice?

[Dr. Kaplan] His paranoid schizophrenia is creating a reality in his mind that doesn't exist, and on the basis of the reality that doesn't exist, he is making the decision about whether he wishes to proceed with his defense against the death penalty or not In addition to that, the paranoid schizophrenia is also affecting his ability to think logically

(Super. Ct Hr'g Tr. at 16-17)

[Defense Counsel] So, is [Mr. Corcoran], um, pretending to be mentally ill?

[Dr Kaplan] No I, I also administered tests of malingering, psychological tests of malingering. And they clearly showed he was not malingering any mental disorder Again, if anything, they showed that he was trying to cover up his psychological symptoms and tried to look better than he really was

(Super Ct Hr'g Tr. at 25).

The defense also called to the stand Doctor George Parker, a forensic psychiatrist at the [**34] Indiana University School of Medicine Like Dr Kaplan, Dr. Parker examined numerous documents containing the evaluations of other mental health professionals and conducted clinical interviews with Corcoran on two separate occasions His testimony was consistent with that of Dr. Kaplan

[Defense Counsel] Does [Mr. Corcoran] have a mental disease that affects his capacity to make rational choices to abandon further litigation?

[Dr Parker] Absolutely

[Defense Counsel] And how?

[Dr Kaplan] His diagnosis is schizophrenia, and the symptoms that lead to that diagnosis have a direct bearing on his thought process and why he believes that his execution would be, as he says, a blessed relief The daily torment of his symptoms of psychosis, his lack of understanding of the emotional consequence [*668] to that decision make that a very irrational thought process

(Super Ct. Hr'g Tr at 55-56)

With respect to whether Corcoran may appear to be normal, lucid and in control of his faculties, the following exchange is instructive

[Dr Parker] Um, so, he does his best to minimize the severity of his symptoms, to downplay that he might have any mental disorder [**35] That has been a consistent theme throughout this process . Um, he has a real desire to appear bad rather than mad. So, he wants to be - it is better for him psychologically to appear that he is criminally responsible, than to admit that he has a serious mental illness that may have contributed to his behavior in the past It speaks to how powerful the stigma is against serious mental illness, that he would rather be executed than admit that schizophrenia might be contributing to his desire to die

[Defense Counsel] When someone is trying to appear normal or more normal or bad, I mean, would you need to spend more time with that person in order to come across these delusions?

[Dr Parker] Well certainly, I think Mr. Corcoran did, if you did a brief interview of him, might be able to convince someone things are actually okay He presents that way He is very calm He is disorganized in his thought process He is not stupid He is a bright man. He knows a lot of things He speaks well for himself Um, but not because he speaks well and in an organized way and understands sort of the nature of what is going on, the proceedings that are going against him, doesn't mean that [**36] he has got an understanding at its foundation that is logical And the more time you spent with him, the more time you begin to understand how his thought process is a little bit skewed And, in fact, the deeper you go, the more skewed it appears And you can begin to understand how he might feel that execution might be preferable to life as he currently experiences in [sic].

(Super. Ct Hr'g Tr. at 56-57)

Finally, defense counsel called to the stand Doctor Edmund Haskins, a clinical neuropsychologist Similar to the approach of the other two testifying doctors, Dr Haskins also examined Corcoran's voluminous medical records and conducted a clinical interview, which lasted two to three hours, a few weeks before the hearing. Portions of Dr Haskins' testimony follow

[Defense Counsel] Okay Does Joe - Mr. Corcoran have a capacity to make a rational choice with respect to abandoning his litigation?

[Dr Haskins] I don't believe so.

[Defense Counsel] And why?

[Dr. Haskins] The reason is, that in order to make a rational decision, one has to adequately hold in mind the available options one is considering You have to consider the options You [**37] have to make reasoned judgments, weighing the pros and cons of both options or whatever the options happen to be In Mr Corcoran's case, in the context of this particular decision about, um, waiving his right to post-conviction review, I believe that his psychosis do not permit him to reason and make a reasoned decision in that way. I have to perhaps add that in reviewing the results of the neuropsychological testing that was done with Mr Engum back with Dr Engum back in 1999 clearly he did very well on that testing His ability to perform on tests of memory, tests of attention and concentration, even tests of reasoning, was intact at that time

[*669] Um, but that is not really the issue that we are dealing with here We are dealing with his ability to make a reasoned decision in this particular case In the context of a neuropsychological evaluation, um, when doing puzzles or

> doing other kinds of, of nonemotional [sic] tasks, um, academic intellectual type tasks, he can do very well with that. He is a very bright man. He has good cognitive ability.
>
> Unfortunately, his paranoid schizophrenia, however, is preventing him from being able to put that to use in this particular [**38] case. So, rather than being able to consider all the options and weigh all of the alternatives, he is choosing only that alternative which will most inexorably lead to his own death, and he is doing that on the basis of this paranoid delusion that he is being persecuted and tormented.

(Super. Ct. Hr'g Tr. at 66-67.) Each of the three mental health professionals testifying at Corcoran's competency hearing explained that Corcoran's individual thought processes have been affected by his mental illness. Such competency determinations involve a thorough assessment of a person's mental capabilities, taking into account the impact that mental illness has on those capabilities.

I acknowledge that the existence of delusions and a diagnosis of paranoid schizophrenia do not necessarily preclude rational decision-making and competence. However, all three experts unanimously concluded that Corcoran's decision to welcome and hasten his own death is based on his delusional perception of reality and has no basis in rational thought whatsoever. The majority as well as the trial court dismiss the mental health experts' conclusions on the basis of Corcoran's own representation that his decision [**39] to die is based upon the fact that he murdered four people and therefore deserves the ultimate sanction. However, as Dr. Parker explained:

> It is better for him [Corcoran] psychologically to appear that he is criminally responsible, than to admit that he has a serious mental illness that may have contributed to his behavior in the past. It speaks to how powerful the stigma is against serious mental illness, that he would rather be executed that admit that schizophrenia might be contributing to his desire to die.

(Super. Ct. Hr'g Tr. at 56-57). Obviously, Corcoran is a man of considerable intelligence and expressive powers. But the fact that he offers what otherwise might be considered a rational explanation for his decision to die is itself intricately related to his mental illness.

Although I remain opposed to the execution of the seriously mentally ill, see *Corcoran, 774 N.E.2d at 502* (Rucker, J., dissenting), that is not the precise issue before us today. Rather, defense counsel merely seeks the opportunity to pursue post-conviction relief on Corcoran's behalf. The uncontroverted evidence that Corcoran is a delusional paranoid schizophrenic is, in [**40] my view, insufficient to support a finding of competence as contemplated by the test articulated in either Rees or Dusky. Thus, I am of the view that Corcoran is in no position to waive his right of post-conviction relief and that this cause should be remanded to the post-conviction court for its review of the claims counsel makes on Corcoran's behalf.

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LEXSEE 1992 U S APP LEXIS 6330

WALTER STEWART, Petitioner-Appellee, v. HOWARD PETERS, III, Respondent-Appellant.

No. 91-2922

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1992 U.S. App. LEXIS 6330

April 7, 1992, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No 89 C 8761. Charles R. Norgle, Sr., Judge.

Original Opinion of February 27, 1992, Reported at *1992 U S App LEXIS 2761*.

JUDGES: Before Hon. William J Bauer, Chief Circuit Judge, Hon. Richard A Posner, Circuit Judge, Hon. Michael S Kanne, Circuit Judge

OPINION

ORDER

In the last sentence of the panel opinion issued on February 27, the judgment of the district court is "reversed with directions to deny the petition for habeas corpus." The petition for rehearing points out, and the state's response confirms, that the petitioner had presented in the district court alternative grounds for habeas corpus which the district judge had not passed on. (Neither of the parties had mentioned the existence of these unresolved grounds in their briefs, or at the oral argument.) The better practice in habeas corpus death cases is for the judge to rule on *all* the grounds presented in the petition, so that the appellate court can decide the entire case in one round, without the interminable delays that characterize postconviction proceedings in such cases. *King v. McCotter, 795 F.2d 517 (5th Cir. 1986)* [*2] (per curiam); cf. *Thigpen v. Smith, 792 F.2d 1507 (11th Cir. 1986)*. Unfortunately that was not done here, and we hereby modify our decision to make it a simple reversal and remand for further proceedings consistent with our opinion, thus leaving it to the district judge to decide in the first instance what further proceedings are proper in this case. In all other respects the petition for rehearing is denied.

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
JUL 20 2009
OFFICE OF THE CLERK

No. 08-10495

IN THE
Supreme Court of the United States

JOSEPH EDWARD CORCORAN,
Petitioner,

v.

MARK LEVENHAGEN,
Superintendent, Indiana State Prison,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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JUL 23 2009

CAPITAL CASE

QUESTION PRESENTED

I. Did the Seventh Circuit correctly deny habeas relief where, before trial, the prosecutor offered to forego seeking the death penalty if Corcoran would agree to a bench trial in lieu of a jury?

II. Did the Seventh Circuit correctly deny habeas relief where the state courts determined that Corcoran was competent to decide for himself whether or not to seek state post-conviction review of his convictions and sentences?

III. Should the Seventh Circuit have remanded Corcoran's case to the district court to consider additional claims where Corcoran did not request that relief in his appeal or otherwise timely bring those issues to the Court of Appeals' attention?

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Chaffin v. Stynchombe, 412 U.S. 17 (1973) 6
Clemons v. Mississippi, 494 U.S. 738 (1990) 11
Corbitt v. New Jersey, 439 U.S. 212 (1978) 6, 7
Corcoran v. Buss, 483 F.Supp.2d 709 (N.D.Ind. 2007) 4
Corcoran v. Buss, 551 F.3d 703 (CA7 2008) 1, 7, 9
Corcoran v. State, 739 N.E.2d 649 (Ind. 2000) 2
Corcoran v. State, 774 N.E.2d 495 (Ind. 2002) 1, 2, 10
Corcoran v. State, 820 N.E.2d 655 (Ind 2005) 2, 3, 9
Corcoran v. State, 845 N.E.2d 1019 (Ind. 2006) 3
Kane v. Garcia Espitia, 546 U.S. 9 (2005) 6, 7, 8
Lockyer v. Andrade, 538 U.S. 63 (2003) 6, 7, 8
Miller-El v. Dretke, 535 U.S. 231 (2005) 9
Mitchell v. Esparza, 540 U.S. 12 (2003) 6, 7, 8
North Carolina v. Alford, 400 U.S. 25 (1970) 6
Rees v. Peyton, 384 U.S. 312 (1966) 8
Teague v. Lane, 489 U.S. 288 (1989) 11
United States v. Jackson, 390 U.S. 570 (1968) 4, 6
Wiggins v. Smith, 539 U.S. 510 (2003) 9

Statutes

28 U.S.C. § 2254(d) 11
I.C. § 35-50-2-9(b) 10

TABLE OF CONTENTS

Statement 1

Reasons to Deny the Petition

I. Corcoran presents no issue of sufficient importance to warrant this Court's review 5

II. The Seventh Circuit properly determined that there is no clearly established federal law prohibiting prosecutors from asking Corcoran to waive his right to a jury trial in exchange for avoiding the death penalty 5

III. The Seventh Circuit properly determined that the state courts reasonably found Corcoran to be competent to forego state post-conviction review 8

IV. Corcoran has waived review of his remaining habeas claims by not timely raising them below 9

Conclusion 12

STATEMENT

1. Joseph Corcoran stands convicted of and sentenced to death for the murders of four men, including his brother and his sister's fiancé. The Seventh Circuit recounted the facts underlying the crime as follows:

> The nature of the offense is clear; Corcoran and his defense team do not dispute the events. On July 26, 1997, Corcoran was lying on his bedroom floor and heard men's voices. He became upset because he thought the men were talking about him and took a semi-automatic rifle downstairs to confront them. In the living room were four men, including Corcoran's brother and future brother-in-law, both of whom lived in the house with Corcoran.
>
> Corcoran shot and killed Jim Corcoran, Scott Turner and Timothy Bricker at close range. The final victim, Doug Stillwell, tried to escape, but Corcoran chased him into the kitchen and shot him in the head.

Corcoran v. State, 774 N.E.2d 495, 501 (Ind. 2002) (*Corcoran II*), *reh'g denied* (citations omitted).

2. The State of Indiana charged Corcoran with four counts of murder. The State made Corcoran two alternative offers under which Corcoran would not face the death penalty: 1) he would plead guilty in exchange for an agreed sentence of life imprisonment without the possibility of parole; 2) Corcoran would waive a jury trial in exchange for the State's not requesting the death penalty. *Corcoran v. Buss*, 551 F.3d 703, 704 (CA7 2008) (*Corcoran VII*), *reh'g and reh'g en banc denied*.[1] Corcoran rejected both offers against the advice of counsel. *Id.* After nine months of negotiations, the State withdrew its offers and requested that Corcoran be sentenced to death. *Id.* At trial, the jury found Corcoran guilty on all counts and

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[1] Corcoran did not number the pages of his appendix, so Respondent does not cite it throughout this brief.

unanimously recommended that the death penalty be imposed by the trial court. *Id.* at 705. The trial court followed that recommendation and sentenced Corcoran to death. *Id.*

On direct appeal, Corcoran appealed only his sentence. The Indiana Supreme Court upheld the constitutionality of Indiana's death penalty as it applied in Corcoran's case and specifically rejected Corcoran's argument that the State violated his Sixth Amendment right to a jury trial when the State offered to refrain from seeking the death penalty if Corcoran would waive a jury trial. *Corcoran v. State*, 739 N.E.2d 649, 654 (Ind. 2000) (*Corcoran I*). However, the state supreme court vacated the death sentence and remanded the case for resentencing due to the possibility that the trial court impermissibly relied upon a non-statutory aggravating circumstance when imposing a death sentence. *Id.* at 657.

On remand, the trial court reimposed a death sentence. On appeal, the Indiana Supreme Court affirmed. *Corcoran II*, 774 N.E.2d at 448-49.

3. Pursuant to Indiana law, Corcoran was required to file a petition for post-conviction relief in the state trial court by September 9, 2003. *Corcoran v. State*, 820 N.E.2d 655, 657 (*Corcoran III*), *aff'd on reh'g*, 827 N.E.2d 542 (Ind. 2005) (*Corcoran IV*). Corcoran, however, refused to sign the petition his attorneys prepared for him, thereby preventing its filing. *Corcoran III*, 820 N.E.2d at 657. His counsel moved the post-conviction court for a competency determination, which the court conducted. *Id.* at 657-58. Corcoran's counsel obtained the opinions of three mental health professionals who all concluded that Corcoran suffered from

paranoid schizophrenia and who were concerned with how that disease affected his decisionmaking. *Id.* at 660. The experts found that Corcoran understood his legal position and one expert also opined that Corcoran was clearly aware of the status of his case and what was at stake. *Id.* They all concluded that Corcoran was incompetent. *Id.* Corcoran personally testified that he wanted to be executed because he is guilty and he believes that execution is a just punishment for those crimes. *Id.* The post-conviction court found that although Corcoran suffers from a mental illness, he nonetheless understood the proceedings, the ramifications of his actions, and was able to make rational choices regarding his case; thus it found him competent to make the decision not to pursue state post-conviction review. *Id.* at 661.

The Indiana Supreme Court affirmed the competency determination. *Id.* at 658-62. The state supreme court concluded that the evidence supports the lower court's findings that Corcoran rationally understood and appreciated his legal position, as well as made the decision to forego further review in a rational manner. *Id.* at 662. The court reaffirmed its decision on rehearing. *Corcoran IV*, 827 N.E.2d at 543.

While that appeal was pending, Corcoran changed his mind and attempted to file the post-conviction relief petition that his attorneys had prepared for him and that he finally signed and verified. *Corcoran v. State*, 845 N.E.2d 1019, 1020 (Ind. 2006) (*Corcoran V*). The post-conviction court dismissed the petition as untimely, a judgment that the Indiana Supreme Court affirmed. *Id.*

4 Corcoran also filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. The district court granted the petition on the ground that the offer made by prosecutors to refrain from seeking the death penalty if Corcoran waived a jury trial violated Corcoran's Sixth Amendment right to a trial by jury under *United States v. Jackson*, 390 U.S. 570 (1968). *Corcoran v. Buss*, 483 F.Supp.2d 709 (N.D.Ind. 2007) (*Corcoran VI*). In the district court's view, the offer served to coerce Corcoran into waiving his constitutional right to a jury trial or else be executed. *Id.* at 723-24.

The district court also found, however, that the state courts' determinations that Corcoran was competent to forego state post-conviction review was reasonable and denied relief on that basis. *Id.* at 729-34. The district court granted a writ of habeas corpus contingent upon the State's failing to impose a sentence other than death on Corcoran. *Id.* at 734.

The State appealed the judgment and Corcoran cross-appealed, challenging the competency determination. The Seventh Circuit reversed the grant of a writ of habeas corpus. The panel unanimously held that the Indiana Supreme Court reasonably applied *Jackson* and other precedent of this Court in determining that Corcoran's jury trial rights were not infringed upon by the prosecutor's offer. *Corcoran VII*, 551 F.3d at 709-12. Additionally, the panel majority held that the Indiana courts reasonably found Corcoran to be competent to forego state post-conviction review. *Id.* at 713-14. Judge Williams dissented from the latter finding

and wrote separately to express her view that the state courts unreasonably determined that the facts support a competency finding. *Id.* at 714-18.

Corcoran petitioned for rehearing and argued in part for the first time that instead of denying him habeas relief, the court of appeals should have remanded the case to the district court to adjudicate other claims raised in Corcoran's habeas petition that the district court had found to be moot in light of its grant of habeas relief. The panel denied rehearing and no judge called for a vote on the suggestions for rehearing en banc.

REASONS TO DENY THE PETITION

I. Corcoran presents no issue of sufficient importance to warrant this Court's review.

The petition offers no compelling reason to grant plenary review. It does not present questions that are of any particular national importance or about which there is any significant split of authority. At bottom, Corcoran merely asks the Court to consider anew the merits of claims. The Court should decline this invitation and deny the petition.

II. The Seventh Circuit properly determined that there is no clearly established federal law prohibiting prosecutors from asking Corcoran to waive his right to a jury trial in exchange for avoiding the death penalty.

Corcoran has never identified any clearly established precedent from this Court that prohibits prosecutors from asking criminal defendants to waive their right to a jury trial in the course of negotiations. Absent any such authority, the lower courts were bound to defer to the Indiana Supreme Court's reasonable

conclusion that this offer did not impermissibly burden Corcoran's right to a jury trial. *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (per curiam); *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003); *Mitchell v. Esparza*, 540 U.S. 12, 17-19 (2003) (per curiam).

United States v. Jackson, Corcoran's primary authority supporting his claim, does not actually inform this question. *Jackson* dealt with the unrelated issue of whether a federal statute, in that case the Federal Kidnapping Act, could permissibly provide for the death penalty only when a defendant insists on a jury trial while limiting sentences to a maximum of life imprisonment where a defendant is convicted following a guilty plea or bench trial. *Jackson*, 390 U.S. at 570-71. The court held that this provision impermissibly burdened the right to a jury trial by penalizing defendants who choose to exercise that right. *Id.* at 581. The Court explained, "the evil of the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them." *Id.* at 583.

Jackson does not, however, prohibit "every government-imposed choice . . . that has the effect of discouraging the exercise of constitutional rights," *Chaffin v. Stynchombe*, 412 U.S. 17, 29 (1973), and the Court has repeatedly reaffirmed plea bargaining despite its inherent effect of discouraging defendants from asserting constitutional rights. *See, e.g., id.*; *Brady v. United States*, 397 U.S. 742 (1970); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Corbitt v. New Jersey*, 439 U.S. 212, 219 n.9 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 368 (1978). The

Court has also clearly established that prosecutors can entice a criminal defendant into waiving his right to a trial by offering to forego the death penalty. *Corbitt*, 439 U.S. at 218.

The Seventh Circuit properly recognized that the State's offer to Corcoran was fully consistent with this Court's precedent. *Corcoran VII*, 551 F.3d at 711-12. Corcoran attempts to distinguish his case from other plea bargaining cases by noting that that one offer at issue here—to be tried by the bench rather than the jury—did not involve a guilty plea. Why that distinction should matter, Corcoran does not make clear. Regardless, the State offered to forgo the death penalty if Corcoran would accept a bench trial *in addition to* offering the same if Corcoran would plead guilty, but Corcoran refused both. *Id.* at 704. The only real difference between the two offers was that in the bench trial offer, the prosecution stood to benefit less, and the defendant gave up fewer protections.

Before he may obtain habeas relief, Corcoran must point to some clearly established authority prohibiting prosecutors from negotiating accommodations less than a full plea by offering lenient sentencing. Absent such a case, the Indiana Supreme court's adjudication of this claim cannot be contrary to or an objectively unreasonable application of federal law. *Garcia Espitia*, 546 U.S. at 10; *Andrade*, 538 U.S. at 72; *Esparza*, 540 U.S. at 17-19. Because Corcoran failed to satisfy that burden, the Seventh Circuit properly denied him habeas relief and this Court should deny his petition.

III. The Seventh Circuit properly determined that the state courts reasonably found Corcoran to be competent to forego state post-conviction review.

Corcoran asks this Court to reweigh the evidence regarding his competency and decide for itself, and as if it is the trier of fact, whether Corcoran was competent to decide not to sign and file his petition for state post-conviction relief. The Court should decline that invitation. Rather, in order to obtain habeas relief on this claim, Corcoran must demonstrate that the state courts' factual findings that Corcoran was competent are objectively unreasonable in light of the evidence presented. Corcoran cannot do so because evidence supports the state courts' findings that Corcoran appreciates his legal position and can make a rational choice regarding the continuation of his litigation.

As an initial matter, Respondent observes that this claim asks whether it violates the federal constitution if a prisoner is incompetent to invoke (or not) collateral review that is entirely a creature of state law. It is true that this Court has found a federal right to competency before a petition for a writ of certiorari can be withdrawn from this Court. *See Rees v. Peyton*, 384 U.S. 312 (1966). But the Court has never clearly established that the federal constitution requires potential state collateral review litigants to be competent before they may decide whether or not to seek such review, so Corcoran's claim must fail. *Garcia Espitia*, 546 U.S. at 10; *Andrade*, 538 U.S. at 72; *Esparza*, 540 U.S. at 17-19. Nevertheless, the Seventh Circuit presumed such a federal right, but it correctly found that evidence supports the state courts' findings on the matter.

Corcoran essentially argues that the state courts were obligated, as a matter of federal law, to bind themselves to the opinions of the three expert witnesses that Corcoran's post-conviction counsel hired to support their theory of incompetence. But federal law does not require that; rather, the trial court was free either to accept or reject the findings of these witnesses. Contrary to Corcoran's argument, no fair reading of *Wiggins v. Smith*, 539 U.S. 510 (2003), or *Miller-El v. Dretke*, 535 U.S. 231 (2005), permits habeas courts to substitute their independent judgment of the evidence for that of the state courts. The Seventh Circuit properly reviewed the state courts' factual findings for reasonableness in light of the evidence presented.

Because expert testimony supports the state courts' findings that Corcoran appreciated his legal position and the consequences of his decision, *Corcoran III*, 820 N.E.2d at 660, the only real debate is whether Corcoran's mental illness prevented him from making a rational choice not to sign his petition. The post-conviction court chose to credit Corcoran's own in-court testimony regarding his reasoning over the interpretations given by the experts to other statements Corcoran had made. *Id.* at 661. That credibility determination was reasonable, *Corcoran VII*, 552 F.3d at 714, and therefore properly the province of the state post-conviction court. Neither the Seventh Circuit nor this Court is free to reevaluate it on review in federal habeas.

IV. Corcoran has waived review of his remaining habeas claims by not timely raising them below.

Corcoran has waived his claims that the district court declined to adjudicate on their merits because he did not present those claims to the Seventh Circuit until

his petition for rehearing. Despite Corcoran's filing of a cross-appeal to obtain appellate review of the district court's rejection of his post-conviction competency claim, Corcoran did not present any argument regarding the other claims that the district court found to be moot or even request a remand to the district court for it to reconsider those claims following reversal on the plea bargain claim. Nor did Corcoran request a certificate of appealability on those issues. Consequently, the claims are waived.

In any event, Corcoran's claims are frivolous and remand would not be an appropriate use of judicial resources. Corcoran does not outline those claims in his petition, but he did in his petition for rehearing in the Seventh Circuit. The first of these claims argues that the trial court considered non-statutory aggravating circumstances and failed to consider mitigating circumstances. As for the allegation regarding non-statutory aggravating circumstances, it is simply impossible to infer from the sentencing statement that any such circumstances were considered as the trial court's order was emphatic and unambiguous in this regard. *Corcoran II*, 774 N.E.2d at 499 ("We are now satisfied that the trial court has relied on only aggravators listed in Indiana Code § 35-50-2-9(b). In response to our remand, the trial court stated, '[I]n balancing the proved aggravators and mitigators, [the trial court] emphasizes to the Supreme Court that it only relied upon those proven statutory aggravators.' There is no lack of clarity in this statement and no plausible reason to believe it untrue.").

With regard to Corcoran's assertion that the trial court refused to consider his mitigating evidence, it is equally meritless: the trial court's sentencing orders explicitly discuss each of Corcoran's proffered mitigating circumstances and, in any event, the Indiana Supreme Court re-evaluated them in detail, curing any possible oversight committed by the trial court. *Id.* at 499-500. *See Clemons v. Mississippi*, 494 U.S. 738, 748-49 (1990) (appellate weighing of aggravating and mitigating circumstances satisfies the constitutional requirement of an individualized and reliable sentencing determination in capital cases).

The second claim is that Indiana's death penalty statue violates the Eighth and Fourteenth Amendments because the aggravating circumstances used to narrow the class of defendants eligible for the death penalty is the same as the circumstances that make defendants eligible for life imprisonment without the possibility of parole. In his petition for rehearing, Corcoran describes this argument as "an issue of first impression" that "no federal court of competent jurisdiction . . . has considered." C.A. Petition for Rehearing at 14. Consequently, Corcoran concedes that habeas corpus relief is unavailable for this argument because it is impossible for him to satisfy the requirements of 28 U.S.C. § 2254(d). Additionally, any new rule that could be announced by this Court would be nonretroactive to this case under *Teague v. Lane*, 489 U.S. 288 (1989).

Corcoran seeks remand not to vindicate potentially meritorious claims that have been heretofore overlooked; he merely seeks additional delay while the lower courts formally discuss frivolous assertions that lack basis in either law or fact. The

Court of Appeals properly declined to remand this case for further consideration of Corcoran's habeas petition.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney General of Indiana
THOMAS M. FISHER*
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Section Chief

*Counsel of Record

Counsel for Respondent

July 20, 2009

No. 08-10496

IN THE

Supreme Court of the United States

JOSEPH EDWARD CORCORAN,
Petitioner,

v.

MARK LEVENHAGEN,
SUPERINTENDENT, INDIANA STATE PRISON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

DECLARATION OF SERVICE

In accordance with Rule 29.5(c), I hereby certify under penalty of perjury that three copies of the BRIEF IN OPPOSITION in the above captioned case have been served by first-class mail, U.S. Postal Service, this July 20, 2009, to the parties that must be served as listed below:

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JUL 23 2009

REPLY BRIEF

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Supreme Court, U.S.
FILED
AUG - 3 2009
OFFICE OF THE CLERK

No. 08-10495

In The Supreme Court Of The United States

JOSEPH EDWARD CORCORAN,

Petitioner,

v.

MARK A. LEVENHAGEN, Warden,

Respondent.

RECEIVED
AUG 11 2009
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SUPREME COURT, U.S.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner briefly provides the following rebuttal points to arguments raised by Respondent's Opposition to the Petition for Writ of Certiorari. Otherwise, Petitioner stands on his original Petition.

1. **Petitioner does present a valid basis for certiorari review.**

Contrary to Respondent's contention, Petitioner presents questions of significant constitutional significance. Indeed, the petition presents questions related to the doctrine of unconstitutional conditions and the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

2. **The Penalty Imposed for Invoking a Constitutional Right Is a Principle Recognized by this Court.**

Contrary to Respondent's contention, this Court has found constitutionally prohibitive exactly what occurred in Petitioner's case – the imposition of a penalty for the invocation of a constitutional right. Under *United States v. Jackson*, 390 U.S. 570 (1968), a prosecutor cannot chill the exercise of a defendant's right to a jury trial with the threat of the death penalty. This Court has never allowed what occurred herein, equating a bench trial to those circumstances

where guilt is not in play. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973) (where this Court grouped *North Carolina v. Alford*, 400 U.S. 25 (1970) no contest pleas with straight plea cases).

3. State Court Finding Must Have Some Support in the Record.

Contrary to Respondent's contention, this Court requires under AEDPA that a state court's conclusion be supported by some evidence in the record. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Miller-El v. Dretke*, 535 U.S. 231, 241-52, 265 (2005). Petitioner presents a unique circumstance where every expert testified as to his *incompetence* and the correctional records supported their assessment. In spite of such, the state trial court found Petitioner competent.

Petitioner's case presents a compelling AEDPA question wrapped in uncontested incompetency opinions from experts but a court ruling to the contrary. For purposes of Petitioner's request, it makes no difference that there were only three experts saying he was incompetent versus ten experts saying he was incompetent. The underlying question remains the same, should a state court have some record basis to support its conclusion.

4. A Party Does Not Waive Issues Rendered Moot By Winning Another Claim on the Merits.

Respondent suggests a novel requirement for federal courts throughout this country. A requirement that a federal court must address every single ground in a complaint in every single federal case ever filed, not just habeas proceedings, regardless of granting relief. This unparalleled request eviscerates a federal court's ability to control cases, eviscerates tools like summary judgment, judgment on the pleadings, discovery and other civil tools to refine the issues before a federal court.

It also slows habeas proceedings down by requiring a review of all the merits in every single case. Under Respondent's contention, even if a court is granting guilt phase relief, the

court must also engage in a plenary review of all penalty phase relief claims even though the habeas petitioner would receive penalty phase relief as part and parcel to the guilt phase relief.

Respondent utterly ignores that Petitioner relied on Seventh Circuit authority in another capital habeas that required a remand for a consideration of the merits. *Stewart v. Peters*, 1992 U.S. APP. LEXIS 6330 (7th Cir. 1992) (Attached in Apx.-48). The Seventh Circuit's refusal to follow its own procedural requirements is significant in that it has deprived Petitioner without adequate notice of his opportunity to receive merits review of non-procedurally defaulted constitutional claims. Also, the Seventh Circuit violated *Ford v. Georgia*, 498 U.S. 411 (1991), by imposing a new procedural requirement upon Petitioner without adequate notice.

Respondent's discussion of the merits of the claims is premature because federal review of those claims has never occurred at either the district or circuit level. This Court recently addressed such a circumstance and remanded with directions for a consideration of a claim not full addressed on the merits by both the district and circuit courts. *Cone v. Bell*, 129 S. Ct. 1769, 1786 (2009) (noting the lower federal courts failed to consider the merits of a *Brady* claim as it relates to the penalty phase).

CONCLUSION

For the foregoing and previous stated reasons, this Court should grant Petitioner's Petition and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit. Alternatively, this Court should grant, vacate and remand for a consideration of Petitioner's non-procedurally defaulted claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Please take notice that on August 3, 2009, I served Mr. Thomas M. Fisher, Solicitor General, and Mr. Stephen R. Creason, Section Chief, Office of the Attorney General, 302 W. Washington St., 5th Floor, Indianapolis, IN 46204, via regular U.S. Mail.

LAURENCE E. KOMP*
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August 3, 2009

Clerk,
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: Corcoran v. Levenhagen,
Case No. 08-10495

Dear Clerk:

Enclosed please find the original and ten (10) copies of Petitioner's Reply in Support of Petition for Writ of Certiorari with a certificate of service confirming service upon opposing counsel. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Laurence E. Komp

Enc.

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